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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Petitioners

v.

EAZOR EXPRESS, INC., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the District Court on liability is reported at 357 F. Supp. 158 and is reproduced at pp. 2a-20a. of the separately bound appendix to this petition ("App."). The opinion of the District Court on damages is reported at 376 F. Supp. 841 and is reproduced at App. 21a-37a. The opinion of the Court of Appeals is reported at 520 F.2d 951 and is reproduced at App. 39a-77a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1975 (App. 78a-79a). A timely petition for rehearing was denied on August 29, 1975 (App. 80a).

On November 7, 1975 and December 19, 1975, Mr. Justice Brennan entered orders extending the time within which to file a petition for a writ of certiorari until December 29, 1975 and December 31, 1975, respectively. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. (a) Where the members of a union engage in a work stoppage unauthorized by the union, but in violation of the no-strike clause of the applicable collective bargaining agreement, does the union have a duty, enforceable by the employer in a suit under § 301 of the Labor Management Relations Act of 1947, to use every reasonable means to terminate the strike?

(b) In a suit against a labor union permitted by § 301(b) of the Act which provides that a union "shall be bound by the acts of its agents," may the union be held liable for an unlawful strike by all its members employed by a particular employer, when those members constitute 6% or less of the union's total membership and the union did not authorize the strike?

(c) Where a union has a contractual duty, express or implied, to use every reasonable means to terminate an unauthorized strike, by what standards should the union's performance of that duty be measured? In the event of a breach of that duty, how are the employer's damages to be determined?

2. (a) Where the measure of a plaintiff's damages is his loss during a particular period, and trial of that issue has consumed weeks of conflicting testimony, does the trial court comply with the requirements of Rule 52(a), Federal Rules of Civil Procedure, by simply stating its conclusion as to the amount lost,

without making any subsidiary findings which show how conflicts were resolved, what competing accounting theories were adopted, and what computations were made to reach that conclusion?

(b) Where an award of prejudgment interest is permissible as an exercise of equitable discretion by the district court, must the court make findings which disclose that it has exercised its discretion and the equitable basis for granting interest?

(c) When a court of appeals substantially increases the amount of a judgment to which the district court had appended prejudgment interest, is remand required for a renewed exercise of the district court's discretionary power with respect to the grant or denial of prejudgment interest? If not, may the court of appeals grant prejudgment interest on the increased judgment without disclosing that it has exercised its discretion and the equitable basis for granting interest?

STATUTE AND RULE INVOLVED

This case involves §§ 301(a), (b) and (e) of the Labor-Management Relations Act of 1947, (hereafter "the Act") 61 Stat. 136, 156, 29 U.S.C. §§ 185 (a), (b) and (e), and Rule 52(a) of the Federal Rules of Civil Procedure. These are set forth in the statutory appendix to this brief at pp. 1b-2b, *infra.*

STATEMENT OF THE CASE

Introduction

This Petition seeks review of a judgment in excess of one million dollars plus prejudgment interest, for damages allegedly suffered by an employer during a work stoppage which the courts below found was not au-

thorized by any of the defendant unions. The theory of the judgment was that the unions breached their agreement with the employer by failing to use every reasonable means to terminate the strike and that they could also be held liable for the "mass action" of all the unions' members employed by a particular employer, although those members were but a minute fraction of each defendant's total membership. In concluding, with hindsight, that the union should have taken "stronger measures" to terminate the strike (App. 59a) than declaring the strikes to be illegal and instructing and persuading the striking members to return to work, the courts did not take into account the fact that the employer did not call upon the union to take such measures, nor other surrounding circumstances which tended to show that these would have been unsuccessful, if not indeed, as the union officials believed, counterproductive. The plaintiff was awarded all its strike losses after the first two days of the strike, although there was no finding that if the unions had not breached the agreement, the strike would have ended then, or any time before it actually did. Although there was a lengthy and complicated trial to determine the amount of the plaintiffs' strike losses, the District Court simply stated a figure which represented its conclusion on that issue, providing the parties and the appellate courts with no explanation as to how that figure was reached; the Court of Appeals affirmed despite the specificity requirements of Rule 52(a) F.R.Civ.P. and although the absence of underlying findings made meaningful review impossible. The District Court added prejudgment interest, without stating whether it did so under a felt compulsion of law, or in the exercise of discretion, and if the latter, the basis of that exercise; again the Court of Appeals affirmed despite the absence

of findings and although its decision on the merits approximately doubled the original judgment, raising prejudgment interest alone to above $350,000.

I. THE FACTUAL BACKGROUND

A. The Parties and the Agreements

Respondent, Eazor Express, Inc. (Eazor) and respondent, Daniels Motor Freight, Inc., (Daniels) which is now wholly owned by Eazor, are motor carriers engaged in interstate commerce. (They will sometimes be referred to jointly as "the employer"). Petitioners Local 249 and Local 377 are labor organizations affiliated with petitioner International Brotherhood of Teamsters (hereafter "IBT"). Local 377 was the exclusive bargaining representative of the drivers and other employees at Daniels' terminal in Warren, Ohio; Local 249 was the exclusive representative of drivers and other employees working out of, or at Eazor's Pittsburgh terminal. Eazor, Daniels and the locals were parties to the National Master Freight Agreement in force between April 1, 1967 and March 31, 1970, ("NMFA"); it is, as the name implies, a nationwide agreement covering employers and unions in the trucking industry. To this master agreement there were various regional supplements binding upon certain employers and local unions. The Teamsters Joint Council No. 40 Freight Division Over-the-Road Supplemental Agreement and the Teamsters Joint Council No. 40 Freight Division Local Cartage Supplemental Agreement were the supplements binding on Eazor and Local 249; the Central States Area Over-the-Road Motor Freight Supplement with Ohio rider and the Central States Area Local Cartage Supplemental Agreement

bound Daniels and Local 377.[1] The courts below determined that the IBT was also a party to and obligor under the NMFA and its supplements (App. 17a-18a and 46a-48a).[2]

The NMFA contains no no-strike clause. Moreover, the NMFA contains the following exculpatory provision:

> "Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown or work stoppage in violation of this Agreement." (App. 52a-53a)

Each supplemental agreement contains substantially the following no-strike clause:

> "The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, of any controversy which might arise." (App. 42a)

The Central States Supplement also contains the following language:

> "Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of

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[1] They will be referred to herein as the "Joint Council No. 40 Supplement" and "Central States Supplement" respectively.

[2] IBT disagrees with this holding, but in order to narrow the issues in this Court, does not seek review thereof.

the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. . . . It is further agreed that in all cases of an unauthorized strike, slow-down, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members.

"While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. . . ." (App. 53a-54a)

The Joint Council No. 40 Supplement contains no undertaking with respect to unauthorized strikes.

B. The Unauthorized Work Stoppage and the Unions' Efforts To Terminate It

1. The Work Stoppage [3]

On August 17, 1968, Daniels discharged one Roper, a member of Local 377, and on the 19th it discharged another, one Eckley. On the morning of the 20th, meetings were held to resolve the grievances arising from these terminations. When they proved fruitless, Roper and Eckley began to picket the Daniels Warren terminal. The members of Local 377 then walked off their jobs and the strike began. The next morning members of Local 377 established a picket line at Eazor's Pittsburgh terminal which the members of Local 249, employed by Eazor, refused to cross. The discharged employees did not exhaust the contractual grievance procedure, the strikes were unauthorized by the unions, and were in direct violation of the no-strike clauses of the respective supplements to the NMFA. The local union stewards and committeemen at the Warren and Pittsburgh terminals took no steps to dissuade their fellow employees from striking, but participated in and led them.

The strikes were characterized by an accelerating pattern of violence which persisted, despite efforts to enforce injunctions issued by the Court of Common Pleas at Pittsburgh and the United States District Court at Cleveland to control it. The violence included commandeering on the highway plaintiffs' drivers not involved in the strikes and compelling them to abandon their equipment, large scale destruction of Eazor equipment, threats of violence, and shootings, and,

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[3] This description of the circumstances of the work stoppage is taken from the Court of Appeals' narration (App. 42a-45a).

finally, on September 16 an open assault by hundreds of persons on a convoy of Eazor trucks operated from the Pittsburgh terminal under police protection pursuant to a specific order of the Court of Common Pleas. *Eleven of these persons, all members of Local 249, were arrested, convicted and imprisoned for criminal contempt by the Court of Common Pleas.*

Within two or three days of the beginning of the strike Daniels discharged the two union stewards, two union committeemen and 26 other employees. At a hearing before District Judge Lambros in Cleveland the union officials proposed that Daniels permit all employees to return to work without penalty, including the employees whose discharge triggered the work stoppage, whose reinstatement would then be subject to the grievance procedure.

Daniels rejected this offer and indicated that it was unwilling to negotiate the status of the discharged employees until the employees not discharged returned to work. Shortly after this meeting the plaintiffs offered to reinstate all the Local 377 strikers who had been discharged except Roper, Eckley, the stewards and the committeemen, but this offer, which was recommended by Local 377's chief officer and the striking union members' counsel, was rejected by the strikers at Warren. On the same day Eazor at Pittsburgh discharged a 249 steward, a 249 committeeman and one member of 249. Daniels and Eazor then sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11 and with a three-day penalty for each day's participation in the strikes if they returned on September 16. The strikers, how-

ever, rejected this offer and on September 17 Daniels sent letters of discharge to 157 striking employees at Warren and permanently closed that terminal thereby ending the strike there. On September 24 the striking members of Local 249 took a vote, for the first time by secret ballot, and voted to return to work. The next day, September 25, they went back to work at the Pittsburgh terminal and the strike there was over.

2. The Unions' Efforts To Terminate the Strike

The Court of Appeals acknowledged that "There is no doubt that officers of the two local unions and of the Teamsters International Union repeatedly characterized the strikes as unauthorized and illegal and made a series of appeals, both written and verbal, to their striking members to return to work." (App. 43a) This bland description fails to convey the vigor of their actions or the stiff resistance of the members employed by Daniels and Eazor. From the very first the strikers reacted angrily against the union officials who urged and directed them to return to work, booing them, and threatening violence against them. (7JA 2537-2538, 2542-2543, 8JA 2882).[4] Their defiance of the union officials, of their employer, and even of the courts, as well as their widespread violence more than justified the District Court's characterization of the strikers' mood as "ugly" (App. 16a). It was not until after the strike leaders had been jailed for contempt of court and many of the men discharged, and the Warren terminal closed, that the men who remained realized the futility of continuing their strike.

Perhaps the strongest evidence that the unions did all that was expected from them under the contract is what

[4] "JA" refers to the Joint Appendix in the Court of Appeals.

the company said during the strike. Thomas Eazor testified concerning a meeting with Local 249 and Joint Council officials on August 21, the day the picket line was put up in Pittsburgh:

> Q. Did you make any specific suggestions to them (Union officials) as to what they should do to terminate the strike as the strike proceeded?
>
> A. Yes, sir.
>
> Q. What were some of the suggestions that you made?
>
> A. I told them they should have their people go down and get on that line and do everything in their power, what I mean, to get these boys to listen to them, to go back to work. I suggested they call meetings with them up in the union hall, and persuade them, I mean, to listen to them, to take their orders and go back to work, and handle what grievances they had under the terms and conditions of the contract. (9JA 3135)

On August 27, Eazor acknowledged both the unions' role in attempting to end the strike and everyone's difficulty in achieving that goal, when it wrote to the striking employees: "You have defied the International Union. You have defied the Local Union. You have defied the law." And on September 6, Eazor's labor relations representative wrote to the Assistant to the International's General President conveying his "personal thanks for your help in this endeavor" and expressing the hope that "this thing reaches a head soon." (2JA (Exhibits) 362a; 4 JA (Exhibits) 1158a)

II. PROCEEDINGS BELOW

A. The District Court

1. Liability

Eazor and Daniels brought these actions under § 301 of the Act. Trial in the District Court was without a

jury and was bifurcated for separate determination of liability and damages. On March 30, 1973 the District Court decided that defendants had breached the agreements. The court rejected plaintiffs' contention that Local 377 autuhorized the strike. But he concluded that defendants were obligated to "use 'every reasonable means' to end the strike" (App. 8a). He concluded that none of the defendants had satisfied that duty. In his view "the circumstances called for the politics of power rather than the politics of persuasion." (App. 16a). And he expressly refused to give any weight to the unions' judgments as to what means were "reasonable."[5]

2. Damages

The damage phase of the trial occupied weeks of conflicting testimony, including that of accounting experts, principally dealing with the question as to how much loss was sustained by Eazor-Daniels during the strike period. The answer to this question turned on such subsidiary issues as whether the loss sustained during the strike should include the full cost of deferred maintenance performed during the strike; whether depreciation should be allowed on rolling stock during the time in which it was not rolling; whether a subsequent settlement of warranty claims against Ford Motor and Mack Truck should be credited back in part to the strike period; whether losses sustained in branches of plaintiffs' operation which were not affected by the strike should be included in strike period losses; whether monies paid during the strike for expenses incurred before the strike commenced should be included in strike period losses, and if so, to what

[5] App. 18a-19a, n. 18.

extent; whether plaintiffs' or defendants' accounting experts were the more credible and the more expert.

In deciding the damage issues the trial court declined to explain how it resolved any of the "disputes over the intricate mysteries of accounting techniques" (App. 23a), but simply stated that "Plaintiff submits and the Court finds that during the period [of the strike] Eazor lost a total of $1,079,322.00" which became the "starting point" of the strike loss calculation (Id. 26a). (While plaintiff did so submit *on brief,* its own accounting expert had testified, and its own Exhibits showed that those losses were a maximum of $696,255.[6] Plaintiff's post-trial submission was based on the original consolidated statement which plaintiff's counsel had previously represented to the court had "substantially overstated the losses for those months" and disregarded all of the adjustments which had been made by Eazor's accountants in attributing revenues and expenses to proper periods.)[7] The trial judge then adjusted this "starting point" (App. 26a, 30a) for two days of non-culpability, for seventeen days of non-mitigation and for the exclusion of non-recoverable legal fees, thereby producing the amount of the judgment. Moreover, without a single word of explanation as to why he was doing so, the trial judge simply tacked prejudgment interest to the judgment (App. 38a), a matter of approximately $175,000.

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[6] Eazor Ex. 183 and Int. Ax. Y-2 (prepared by Eazor, 3JA (Exhibits 855a, 4JA (Exhibits 1176a).

[7] Exhibit P-180, 3JA (Exhibits 853a).

B. The Court of Appeals

The Court of Appeals held that "necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun without their authorization." (App. 50a). It also held that the unions were liable also on the "so-called mass action theory[:] When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union * * * mass action by union members must realistically be regarded as union action." (Id. 57a). The court agreed with the trial court that the unions had failed to use all reasonable means to end the strikes, because they did not use "stronger measures" which were "available". It held that these were: to discipline or remove the job stewards and committeemen who were organizing and leading the strikes; to suspend or fine the striking union members; to impose a temporary trusteeship on the local unions; and to take an earlier secret ballot vote of the striking members. (App. 59a). The court asserted also that the unions "cannot now be heard to urge that the measures to which they did not resort would not have proved successful," (App. 64a) that is, that their "breach" did not prolong the strike and therefore was not the proximate cause of the strike losses.

The court held that Eazor was entitled to recover, as damages, its total strike loss after the unions first failed to take one of these "stronger measures." In so doing, the court in effect converted the "every reasonable means" obligation into a duty to hold Eazor harmless for any damages resulting from the strike.

"The unions' no-strike pledge was not an aleatory promise conditional upon the happening of a fortuitous event in the future. It was rather an undertaking that there should be no strike by union members during the term of the agreement in violation of the no-strike pledge." (App. 63a).

The court acknowledged the "great deal of evidence" offered on the amount of plaintiffs' losses resulting from the strike and that such "evidence was in many respects sharply conflicting" (App. 65a). But it both sanctioned the trial court's failure to make findings resolving these issues and refused to re-examine them. Instead, it accepted that court's $1,079,332 figure. It then rejected his adjustments for non-mitigation and disallowed legal fees (App. 74a), allowed the two-day adjustments for non-culpability and entered a modified judgment for $1,032,580 (App. 76a). Purporting to answer the Unions' complaint that the trial court's award of prejudgment interest was improper and totally unsupported by findings, the court below tacitly assumed that the award was the result of trial court's exercise of its discretion, and although the basis, if any, upon which the trial court had exercised that discretion, was unknown, held that it was not abused. (App. 77a). And it further determined, without discussion, or even any indication that this result was not automatic, that interest should still be awarded although by doubling the judgment on appeal interest alone was increased to over $350,000. (App. 79a).

REASONS FOR GRANTING THE WRIT

I. IN IMPOSING LIABILITY ON PETITIONERS THE COURT BELOW DECIDED QUESTIONS OF ALMOST UNIVERSAL IMPACT ON THE APPLICATION AND NEGOTIATION OF COLLECTIVE BARGAINING AGREEMENTS AND VIOLATED THE PRECEPTS OF CONGRESS AND THIS COURT.

A. Over 93 percent of major collective bargaining agreements contain a no-strike clause.[8] This alone would warrant review of the unprecedented holding below that necessarily implied in the union's agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization.

In *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, cert. denied, 350 U.S. 847, the Fourth Circuit held unanimously that absent evidence that its officers "participated in, ratified, or encouraged the continuance of the strike" the union could not be held liable for breach of that promise even if those officers had done nothing to get the men back to work. Id. at 877. So too, the Sixth Circuit in *North American Coal Corp.* v. *Local Union 2262, etc.*, 497 F.2d 459, 467, n.3 expressly "decline[d] to follow *Eazor*", referring to

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[8] This figure is calculated from U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1822, *Characteristics of Agreements Covering 1,000 Workers or More, July 1, 1973* (1974) Table 72, p. 65. The Labor Department Study revealed that of the 1,339 agreements covering 6.7 million workers analyzed, 779 agreements covering 4.7 million workers were subject to limited no-strike bans (defined as "a statement prohibiting strikes or lockouts except under given circumstances or for specific uses." *Id.* at n.2). In addition, 474 agreements covering 1.6 million workers contained absolute no-strike clauses (defined as "an unmodified statement prohibiting strikes or lockouts." *Id.* at n.1), yielding a total of 1,253 agreements covering 6.3 million workers which contain some form of express no-strike clause.

the District Court's decision herein. Although the District Court herein candidly cited *Haislip* as "*contra*" (App. 12a, n.13), the Court of Appeals sought to distinguish *Haislip* on the ground that there the obligation not to strike had been implied from the promise to submit contract disputes to final and binding arbitration (presaging *Teamsters Union* v. *Lucas Flour Co.*, 369 U.S. 95, 105), whereas here the no-strike obligation was expressed in so many words. (App. 51a). While that distinction has since been endorsed by the Fifth Circuit,[9] it has no basis in *Haislip* or *Lucas Flour*,[10] has already been rejected by this Court in a related context,[11] is contrary to accepted principles of contract interpretation,[12] and represents exceedingly poor labor relations policy as well, given the importance which the Act attaches to written agreements, see § 8(d) codifying the rule of *H.J. Heinz & Co.* v. *Labor Board,* 311 U.S. 514, 523-526, and §§ 302(c)(4) and (5). At best, the validity of the distinction proffered by the Court of Appeals is itself a question of law under § 301 of the Act which this Court should now

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[9] *United States Steel Corp.* v. *United Mine Wkrs. of Am.*, 519 F.2d 1249, 1254-1255.

[10] Neither Judge Parker in *Haislip* nor this Court in *Lucas Flour,* even remotely suggested that the no-strike duty implied from the promise to arbitrate contract disputes differs in any respect from the duty to which the union is subject under an express promise not to strike over such disputes.

[11] *Gateway Coal Corp.* v. *Mine Workers,* 414 U.S. 368, 381 squarely decided that the rule of *Boys Markets* v. *Retail Clerks,* 398 U.S. 235 governs whether the contractual undertaking not to strike is express or implied.

[12] "Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent". Restatement of Contracts, § 5, Comment a. See also Williston, Contracts, § 3, pp. 8-9 (3d ed. 1957); 1 Corbin, Contracts § 18, pp. 39-42 (1960).

decide because it directly affects not only the soundness of the decision below with respect to agreements which contain no-strike clauses, but also those 6% of major agreements which do not, but which do provide for final and binding arbitration, and from which the no-strike obligation is therefore implied under *Lucas Flour,*[13] leaving untouched by the decision below only 1% of all collective bargaining agreements presently in force.

Additionally, the decision below will inevitably burden the negotiation of new collective bargaining agreements. Henceforth unions will be reluctant to accept a no-strike clause, lest they thereby unwittingly commit themselves also to the duty to police strikes which they have not authorized, participated in or ratified. Their reluctance will be compounded by the standard which the court below established for judging performances of that duty, a standard which does not take into account the surrounding circumstances, such as the legal limitations on union's authority, the failure of the employer to demand action by the union or the reasonableness of the union officials' judgment that their actions would aggravate rather than terminate the work stoppage. Nor will unions readily jeopardize their assets by submitting to the regime imposed by the court below, whereunder the plaintiff employer is relieved of the need for establishing that the breach proximately caused the damages claimed, because the union "cannot

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[13] See the Labor Department Study cited at p. 16, n.8, *supra* at Tables 70-72. Petitioners obtained a computer print-out of the data underlying these tables and determined therefrom that of the 1,339 contracts covering 6.7 million workers included in the Study, 83 contracts, or 6 percent of the total (covering 411,000 workers) did not contain no-strike clauses, but provided for binding arbitration of some or all issues.

be heard to say" (App. 64a) that the strike would have continued even if it had employed all reasonable means to terminate it.

On the other hand, it will frequently be impossible for parties to express their full intentions without including some express no-strike commitment in the agreement. For example, since *Lucas Flour* did "not * * * suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration" 369 U.S. at 106, parties who intend to submit only *some* disputes to final and binding arbitration, but intend to forbid the union from striking over *any* disputes, can do so only by spelling out that no-strike obligation in terms. Precisely because of their importance to both sides, no-strike clauses are commonly drafted in considerable detail to define the kinds of work stoppages which the union may not authorize. The process will be complicated enormously, if, by including an express no-strike obligation (without which such definition is impossible), the parties will run the risk that they will be deemed to have created the additional union duty to terminate unauthorized strikes.[14] That risk will be nationwide because even a court which disagrees with the Third Circuit's analysis in *Eazor* might well reason that parties who, while

[14] The opinion below leaves considerable doubt as to how the parties could, by the express terms of their agreement, successfully exclude such liability. For while the court accorded the fullest sweep of implication to the no-strike clause, it gave the narrowest possible breadth to the contractual language of exoneration, such as, for example, the employers' disavowal of claims against the union for unauthorized acts (App. 52a-54a). This erroneous and unbalanced approach to contract interpretation raises additional problems for collective bargaining which independently merit this Court's attention and correction.

Eazor is on the books, enter into an agreement which contains a no-strike clause, thereby intend to create the duty which *Eazor* implies. "Like other contracts, [a labor agreement] must be read as a whole and in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 279.

B. On the merits, we submit that the court below was wrong in this case, and Judge Parker was right in *Haislip,* where he wrote:

> There is nothing in the contract making defendants liable for "wild cat" strikes or requiring that they take any action with regard to them. This court has pointed out that employees who engage in "wild cat" strikes lose the protection of the [National Labor Relations] Act and may be discharged by their employers with impunity for so doing. N.L.R.B. v. Draper Corporation, 4 Cir., 145 F.2d 199, 156 A.L.R. 989. We have never held, however, that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If [the union agents] had done nothing when plaintiff called on them to get the men back to work, there would have been no liability on the part of the defendants. This being true, defendants were not rendered liable by the efforts which these men made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. *The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike.* There is no evidence of any sort that they did. (223 F.2d at 877-878, emphasis added).

But the Court of Appeals herein said that:

> a no-strike agreement would be illusory indeed were a union to be permitted to avoid all respon-

> sibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect." (App. 50a)

The principle of contract interpretation invoked by the court is entirely sound, but has no proper application to this case, for a no-strike agreement is far from "illusory" if it is understood, as it hitherto has been, as a promise by the union that *it* will not authorize, participate in or ratify work stoppages during the life of the agreement. That management regards this promise to be a substantial benefit is evidenced most clearly by the prevalence of no-strike clauses, and the almost universal insistence thereon by employers in the many years before the Court of Appeals implied therefrom the additional union duty to police unauthorized strikes. Management has relied for protection against unauthorized strikes on its privilege to discharge or otherwise discipline those who lead or participate therein. That privilege was confirmed in 1947 by an amendment to § 13 of the Act which preserved the "limitations" and "qualifications" on the right to strike, one of which is the rule of *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, 344, that the Act does not prohibit the discharge or other discipline of "employees who strike in breach of contract." [15] It is

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[15] S. Rept. No. 105 on S.1126, 80 Cong. 1st Sess., p. 28, 1 Legislative History of the Labor Management Relations Act, 1947 (hereafter "Leg. Hist.") 434.

in *this* sense that the no-strike promise was "binding upon the individual union members on whose behalf the union signed the agreement" (App. 52a); to reason as the court below did, that the union (the bargaining agent) was responsible for the breach by the members (its principal) is to create liability on the novel principle of *respondeat inferior*. Moreover, the court below also failed to appreciate that in 1947 Congress reduced the disciplinary powers of unions even over their own members. As was explained in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175, 184-185 (the case mistakenly relied on below (App. 52a)), Congress by §§ 8(a)(3) and 8(b)(2) deprived unions of the right to cause their members to lose their jobs because they violated a membership obligation. [16]

Professor Cox accurately prophesied the effect of this enactment on the problem of unauthorized strikes:

> The most disturbing aspect of Section 8(a)(3), however, is the provision making it an unfair labor practice to discharge an employee pursuant to an authorized union shop agreement for any reason other than non-payment of dues. By depriving the majority representative of power to expel from the plant individuals seeking to undermine its position, this provision encourages the growth of the dissident groups and dual unionism that breed jurisdictional strife. By depriving the union of its most effective means of disciplining workers who disregard their obligations under a collective agreement, the provision also disables the union from accepting responsibility for the employees' observance of the other terms of a collective agreement. For example, under a true union shop arrangement, a labor union could take

[16] See also *Radio Officers* v. *Labor Board*, 347 U.S. 17, 40-41; *Labor Board* v. *General Motors*, 373 U.S. 734, 742-743.

> effective action to halt wildcat strikes. It could order the men back to work and, if they disobeyed, suspend or expel them, thus bringing about their lay-off or discharge. *Under Section 8(a)(3) the back-to-work order would be an empty gesture, for the union would have no effective sanction by which it could be enforced.* Under such circumstances it is unlikely that unions will voluntarily accept any responsibility for the conduct of the employees they represent. [17]

In this legal context it cannot be maintained that in order to "mak[e] the mutual promises binding and to give the contract legal effect" (App. 50a) the union must be bound to enforce the no-strike clause through its sharply circumscribed authority; rather it becomes clear that, as the Fourth Circuit understood, parties who place a no-strike commitment into their agreement intend that it will be enforced against the striking employees by the employer, who may discharge them "with impunity" 223 F.2d at 877, citing *NLRB* v. *Draper* 145 F.2d at 199, a case which followed *Sands*, *id.* at 204.

Contrary to the view of the court below, the implication of a duty to police unauthorized strikes does not "accord with the Congressional intent." (App. 57a). The only legislative material on which the court relied to discover that policy, a section of the 1947 Senate Report referred to at App. 56a and quoted at App. 52a, does not even remotely support that step. This section is entitled "Enforcement of Contract Responsibilities".[18] It shows that Congress' "primary concern" was that collective bargaining agreements

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[17] Cox, Some Aspects of the Labor-Management Relations Act, 1947, 61 Harv.L.Rev. 274, 298-299 (1948).

[18] S. Rept. No. 105, p. 15, 1 Leg. Hist. 421.

should be legally binding and judicially enforceable against both sides; see *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 453-454, discussing and quoting the Senate Report *in extenso.* This was, of course, achieved primarily by providing in § 301 for federal jurisdiction over suits to enforce union-employer contracts. To effectuate § 301(a), Congress declared in § 301(b) that any (covered) union "shall be bound by the acts of its agents" and "may sue or be sued as entity;" in § 301(e) it provided that the common law of agency shall govern "in determining whether one person is acting as an 'agent' for another person". Congress thereby eliminated both the very loose test of responsibility under § 2(2) of the original NLRA and the difficulties of establishing union responsibility under § 6 of the Norris-LaGuardia Act. See the explanation by Senator Taft at 2 Leg Hist. 1622 quoted in full in *Haislip, supra,* 223 F.2d at 878-879, and his descriptions of its effects on union responsibility quoted at p. 27 and id., n. 22, *infra.*

"Congress was also interested in promoting collective bargaining that ended with agreements not to strike". *Lincoln Mills,* 353 U.S. at 453. But even this major objective was not to be accomplished by reading a no-strike promise into every agreement; consistent with the overall philosophy of the Bill, the Senate Report made clear that inclusion or exclusion of a no-strike promise was "a point to be bargained over."[19] All the less can that Report be read as justifying the imposition of the more onerous duty to police unauthorized strikes.

In short, § 301 is concerned with the procedure for enforcing collective agreements, not with their content.

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[19] Id., p. 424.

That is left to collective bargaining. For, "the fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Porter Co.* v. *NLRB*, 397 U.S. 99, 108 quoted with approval in *NLRB* v. *Burns Security Services*, 406 U.S. 272, 287. That policy, embodied in § 8(d), (and implicit in §§ 7 and 13, *see Labor Board* v. *Insurance Agents*, 361 U.S. 477) is binding on the judiciary in suits under § 301. In *Howard Johnson* v. *Hotel Employees*, 417 U.S. 249, this Court met and rejected the contention that § 8(d) (and thus the rule of the *Burns* case, *supra*) was applicable only to the NLRB. This court held:

> Although this distinction was in fact suggested by the Court's opinion in *Burns, we do not believe that the fundamental policies outlined in Burns can be so lightly disregarded.* In *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills did not envision any free-wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements.* Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." Id., at 456. (417 U.S. at 255, emphasis added).

The court below acknowledged that there are limitations to the courts' authority to imply contractual obligations, but found precedent for its course in *Teamsters Union* v. *Lucas Flour Co.* 369 U.S. 95 and *Haislip, supra.* But *Lucas Flour* was heavily and

unsuccessfully relied on by the respondent union and the amicus AFL-CIO in *Howard Johnson.*[20] In *Lucas Flour* itself, the Court took pains to stress that its holding was applicable in only a narrow class of cases; See p. 19, *supra,* quoting 369 U.S. at 106, and *id.* at 105, n.14, expressly rejecting the proposition "that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement".

The basis for distinguishing between those obligations which may and those obligations which may not be implied is not articulated in *Lucas Flour, Howard Johnson* or any other decision of this Court, but the line can be discerned from what has actually been decided: Where the implication of a duty is *necessary* in order to give meaning to a promise which is made that duty may properly be implied, but not otherwise. Thus the promise to submit disputes to final and binding arbitration is "instinct with an obligation imperfectly expressed" not to strike over such disputes.[21] On the other hand, since a collective bargaining agreement provides benefits to both sides even absent a no-strike obligation, and provides benefits to a union even if a successor employer is not bound thereby, this Court properly refused to go further in *Lucas Flour* or to adopt the union's interpretation in *Howard Johnson.* Since, contrary to the view of the court below, the implication of a duty to use every reasonable means to terminate unauthorized strikes is *not* necessary to give meaning and effect to the no-strike clause, see p. 21, *supra,* such implication is not permitted, but

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[20] See Brief for Respondent, No. 73-631, pp. 32-37; Brief for American Federation of Labor and Congress of Industrial Organizations, *id.,* p. 7.

[21] Cf. Cardozo, J. in *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88, 90, 118 N.E. 214 (1917).

rather gives one party to the agreement more than it was able to obtain in collective bargaining, contrary to the "fundamental premise of the Act". *Porter Co., supra.*

C. The "so-called mass action theory" (App. 57a) which was also invoked by the Court of Appeals, imposes liability on unions for the action of its members, notwithstanding Congress' determination in § 301(b) and (e) that they would be liable only for the acts of their "agents" according to the common law. See p. 24, *supra.* In describing union liability under his bill, Senator Taft twice gave the most explicit assurance possible that unions would not be held responsible for the actions of their members. In response to a direct inquiry by Senators Smith (N.J.) and Ferguson (who took the same view) he said:

> I think the word "agent" used here, as used in the contract section, and as used in other places in the bill, means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent. 2 Leg. Hist. 1204-1205. See also *id.* at 1026-1027, reproduced in the margin.[22]

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[22] MR. TAFT. What is a labor organization? It is an organization with officers, exactly like a corporation.

I admit it may be difficult to prove the responsibility of a union. It is sometimes difficult to prove in the case of an employer. If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. There is no case then. There must be legal proof of agency in the case of unions as in the case of corporations; but I do not think there is anything in the fact that a union is an unincorporated association which would bring about a condition in law that the act of every member is necessarily charged to the labor organization. No; I think not.

The foregoing leaves no room under this Act for imposing liability on the premise that "large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members." (App. 57a). Even if it is to be accepted as an immutable truth, subject to judicial notice, that men do not act without leaders, it is still a matter of proof whether in a particular work stoppage those leaders were the officers and agents chosen and authorized to act by the union rather than ad hoc leaders whose illegal acts generated a spontaneous following among the men. Only for the acts of the former has Congress subjected unions as entities to liability. Neither the court below nor any of the other courts which have adopted the "mass action" theory mention § 301(e), or Senator Taft's explanation thereof; they do not even stop to consider that by its action Congress has withdrawn from the courts the authority to impose liability on some judicially created "theory".[23] It is not surprising, therefore, that the

[23] In the court below, we described the unruly growth of the "mass action theory" in detail which cannot be duplicated in a Petition for Certiorari. Suffice it to say that the cases which accept the theory are almost entirely devoid of analysis, resting almost exclusively on the supposed authority of earlier cases in the line tracing back to Judge Goldsborough's oral opinion in *U.S. v. United Mine Workers*, 77 F.Supp. 563, 566. Those decisions failed even to consider whether his reasoning was sapped of all authority when the case was "affirmed on other grounds" (App. 57a) by the Court of Appeals (177 F.2d 29 (D.C. Cir.) cert. denied, 338 U.S. 871). It will be remembered that in *Mine Workers*, the District Court had originally enjoined continuation of a strike and expressly mandated the UMW to "forthwith instruct its members to cease the strike and immediately return to their employment" (id. at 33). It was the union's failure to obey that mandate which the Court of Appeals deemed to be contemptuous. That court also said that if Lewis, the President, had at the beginning sent the members a telegram directing or advising their return "neither he nor the Union would have been guilty of contempt of the

result which they reach is diametrically opposed to that reached by the courts which have decided according to the statute, such as the Fourth Circuit in *Haislip, supra,* and the Sixth Circuit in a series of cases including *Lewis* v. *Benedict Coal Co.,* 259 F.2d 346, 351-352 (Stewart, J.)[24] and *North American Coal Corp.* v. *Local Union 262,* 497 F.2d 459, 467. Even if Senator Taft had not been so explicit, the federal law of agency as declared by Chief Justice Taft in *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295, would be controlling:

> In our previous opinion we held that a trades union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them on; but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association. Id. at 304.

The wisdom of this rule, and the dangers of a harsher standard of responsibility, are given point by facts of this case of which the court below took no note. The consequence of holding the unions responsible for "all the members of a union *employed by a given employer*"

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court's order" (id. at 36), even though the members continued to strike. For this reason, Judge Keech two years later refused to hold the same International in contempt of court for violating an almost identical strike injunction although 370,000 members were on strike, *United States* v. *International Union,* 89 F.Supp. 179, 181 (D.D.C. 1950).

[24] This case was affirmed in part and reversed in part on other issues in 361 U.S. 459.

(App. 57a, emphasis added) is that only 200 of Local 249's approximately 10,000 members (5JA1704) and 355 of Local 377's approximately 6500 members (6JA 2011; 7JA2509) have subjected their unions' treasury to judgments of $655,793 and $366,786 respectively; and while these employees are but 1/40 of 1% of the IBT's total membership, their "mass action" has subjected the IBT to a judgment of over one million dollars.[25]

D. Part and parcel of a contractual duty to use "every reasonable means" to terminate a strike is the standard by which performance of that duty is to be measured.[26] We submit that the term "reasonable" in an agreement, or in any rule of law created under § 301, must be interpreted as declaring an objective

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[25] See also, Gould, The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act, 52 Corn. L. Q. 672 (1967). In applauding the *Haislip* decision, *supra*, Professor Gould wrote:

> * * * While it would seem proper to say that a union must vigorously disavow striking stewards, section 301 cannot be read to require that the union purge itself and discipline the offending members.
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> * * *
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> As a matter of good sense, there are very sound reasons for a narrow concept of union liability. The union bargains for all employees in an appropriate unit, but it does not necessarily have the loyalty of all employees. Even in a union shop, the willingness to follow union leadership on economic questions, as well as matters of discipline of individual employees, may be of varying degrees and intensity. The union may not even be in a position to discipline employees who are non-members. And it is somewhat extreme to hold the union liable for damages when it takes a position opposite to that taken by the striking employees and does not encourage the strike. * * *

[26] Of course, we believe that the standard is the same whether the duty is express or implied, see text at p. 17, n.12, *supra*.

standard which requires consideration of all the circumstances. This is the meaning which this Court recently gave the term in another context under this Act: "'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 257, n.5 quoting with approval, *Quality Mfg. Co.*, 195 NLRB 197, 198, n.3.

This is not remotely the test applied by the court below. It held that the fact that "[n]o stronger measures from the unions' arsenal [than instructions and persuasions] were ever employed, * * * although they were available" (App. 59a) was sufficient to establish the breach.[27] The court did not consider that Congress had depleted the unions' "arsenal of powerful weapons" (App. 63a) in 1947, and had left only the employers with the heavy hardware—the power to deprive strikers of their jobs. Nor did it consider that neither Eazor's threats to exercise that power nor its actual exercise brought the strike to a halt; nor did the court consider that while government's disciplinary authority is far greater than that of any private party, neither an injunction, which of course threatened fines and jail as sanctions for contempt, nor even the imposition of those sanctions terminated the strike.

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[27] Later, the court actually held that only "[i]f the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had exhausted all reasonable measures available to them to end the strike," and even then, "the sole test would be whether available measures were within the power of the unions to employ and might be likely to be effective to end the strikes." (App. 64a).

In short, the court looked only to whether "stronger measures" were "available", not to those external circumstances which showed that they would be bootless. Nor did the court consider whether use of "stronger measures" would be counter-productive—that is, would risk prolonging the strike, or at least disabling the unions from taking any useful role. Reasonable men *do* consider all the circumstances when they plan a course of conduct; specifically, they consider the potential risks as well as the potential benefits of their actions.[28] Moreover, it is obviously not in the interest of promoting industrial peace or any of the other public policies which must be considered under § 301, to induce union officials to take actions which might exacerbate strikes, at the risk of damage suits if they fail to act.[29]

The same error of law also infected the court's decision to hold the unions liable for Eazor's total strike damages after the first two days. Having approved the finding that "the unions used only rhetoric and wholly abstained from the use of any more powerful measures, thus, in practical effect, acquiescing in the

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[28] That is the standard to which the law holds our old friend, "the reasonable man": "The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. At the same time, it must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." Prosser, *Torts* § 32, "The Reasonable Man" p. 150 (4th ed. 1971).

[29] A further objective manifestation of the reasonableness of the unions' approach is Eazor's contemporaneous approval, see p. 11, *supra*.

strike situation," it held that *"they cannot now be heard to urge* that the measures to which they did not resort would not have proved successful." (App. 64a, emphasis added). Thus, although the court acknowledged that "the liability which the unions incurred was for the damages proximately caused by the breach of their contractual obligation to use every reasonable means to end the strikes," (App. 62a-63a) it not only relieved the plaintiff of the duty to establish that damages flowed from that breach, but refused even to hear the unions' contention that the strike would have continued and the strike losses incurred, even if the unions had fully performed.[30]

But most serious of all, the court proceeded from its erroneous view of the union's powers to a further enlargement of the union's promise:

> In view of the arsenal of powerful measures available to them it is highly probable that the unions could have ended the strikes promptly, given the will to do so. We think that the plaintiffs were entitled to rely upon the unions' doing so, this being the only way in which, in the case of unauthorized strikes such as these, they could perform their no-strike promise. To hold otherwise would make a hollow mockery of the unions' no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. (App. 63a-64a)

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[30] There is no warrant in the record, or the findings, for the court's innuendoes, here and elsewhere (App. 59a, 63a) that the unions' breach was willful, but the point is irrelevant since proof of proximate cause may not be dispensed with even where there is a willful breach of contract or even where defendants' conduct is tortious. Cf. under § 303 of this Act, *Teamsters Union* v. *Morton*, 377 U.S. 252, 261-262.

Thus, in order that the employer could recover its strike losses from *someone*, the court having first read the no-strike pledge as including a duty to use every reasonable means to terminate a strike, transmuted it into a promise to hold the employer harmless for the *members'* breach of the agreement.

In *Howard Johnson*, p. 25, *supra*, this Court admonished against just such a "free-wheeling inquiry into what the federal courts might find to be the most desirable rule" and thereupon to give a party protection it could not secure at the bargaining table. 417 U.S. at 255.

II. IN AWARDING DAMAGES AND INTEREST IN THE ABSENCE OF SPECIAL FINDINGS AS REQUIRED BY RULE 52(a), F.R. CIV. P. THE COURTS BELOW DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE TEACHINGS OF THIS COURT.

A. Strike Losses

Rule 52(a), F.R.Civ.P., unequivocally requires that:

> "In all actions tried upon the facts without a jury . . . the court shall find the facts specially . . . ."

But in this case, the trial court's resolution of weeks of conflicting evidence simply states that Eazor had lost $1,079,332. The court sought to justify its failure to specially find the facts by saying that the task would be "of Augean dimensions." (App. 23a).

Of course, the complexities of the evidence and multiplicity of subordinate issues made finding the facts specially all the more indispensable as part of the decision-making process of the trier and to make meaningful appellate review possible. It was grave error for the Court of Appeals to excuse the trier's

non-compliance with Rule 52(a). As this Court held in *Hatahley* v. *United States,* 351 U.S. 181:

> "[I]t is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed." (*Id.* at 182)

Absent relevation of the trial judge's subordinate factual findings, there is no way for an appellate court to know whose testimony he credited, which accounting theories he found to be appropriate, how he resolved the challenges to expenses for deferred maintenance and for items purchased prior to the strike; in short, whether he made missteps as he "threaded [his] way through this maze." (App. 65a).

The decision of the court below is also in conflict with the decisions of other courts of appeals, which have been meticulous in their policing of trial courts to assure adequate compliance with Rule 52(a). See, e.g., *Alexander* v. *Nash-Kelvinator Corporation,* 261 F.2d 187, 190 (2 Cir.), modified 271 F.2d 524; *McManus* v. *Midland Valley Lumber Company,* 348 F.2d 898, 900 (4 Cir.); *United States* v. *Federal Insurance Company,* 483 F.2d 153, 158 (5 Cir.); *Lewis* v. *Pennington,* 400 F.2d 806, 817-18 (6 Cir.), *cert. denied* 393 U.S. 983; *Traylor* v. *United States,* 396 F.2d 837, 839 (6 Cir.); *National Popsicle Corp.* v. *Icyclair,* 119 F.2d 799, 800 (9 Cir.); *Carpenters Local 1273* v. *Hill,* 398 F.2d 360 (9 Cir.); and *Plumbers & Fitters, Local 761* v. *Matt J. Zaich Const. Co.,* 418 F.2d 1054 (9 Cir.).

In each of these cases the Court of Appeals concluded that the district courts had failed to find the facts with the specificity mandated by Rule 52(a) and reversed and remanded with instructions to make such findings. *Plumbers* and *Carpenters,* both of which involved damages for violations of § 303 of the Act, are espe-

cially instructive. Here, as in *Carpenters,* "the testimony and trial briefs [were] of a highly detailed and technical nature." 398 F.2d at 363. In *Plumbers,* the court said:

> Our court has held that when damages are claimed for several distinct elements and the trial court has made a lump sum award, the case should be remanded for supplemental findings of fact on the issue of damages. Carpenters Local 1273 of United Brotherhood of Carpenters and Joiners of America v. Hill, 398 F.2d 360 (9th Cir. 1968). In that case, the lump sum was less than the total of each of the claimed elements of damages so that we had no adequate basis for review as to each element. Here, the award was equal to that claimed, but there is nothing which reveals a specified amount attributable to each element. 418 F.2d at 1059.

A remand for supplemental findings of fact on the issue of damages, as was ordered in *Plumbers,* was all the more necessary here since "the award was equal to that claimed" *originally* by plaintiff, an amount totally discredited by plaintiff's own accountant and exhibit. See p. 13 *supra.*

B. Interest

This Court has not heretofore decided whether the findings requirement of Rule 52(a) applies to the basis for a discretionary award or denial of prejudgment interest. The question is obviously of continually recurring importance in suits under a whole panoply of federal statutes which give one private party a cause of action for damages against another. "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is

denied when its exaction would be inequitable." *Bd. of Commissioners* v. *United States,* 308 U.S. 343, 353. This Court has recently reminded that "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles. * * * That the court's discretion is equitable in nature * * * hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." (*Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 416). Accordingly, Rule 52(a), which makes meaningful appellate review possible, should be adhered to with respect to prejudgment interest, at least where the amount is not *de minimis.* And so the courts of appeals other than the court below, have held and have reversed and remanded where a district court failed to adequately delineate the basis for the grant or denial of prejudgment interest. *Robert C. Herd & Company* v. *Krawill Machinery Corp.,* 256 F.2d 946, 953 (4 Cir.), aff'd on another question, 359 U.S. 297; *McCrea* v. *Harris County Houston Ship Channel Navigation District,* 423 F.2d 605, 610 (5 Cir.) *cert. denied* 400 U.S. 924; *Wessel* v. *Buhler,* 437 F.2d 279, 284 (9 Cir.).

The decision below is in even sharper conflict with *Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191-92 (2 Cir.), where a district court's elaborate articulation of the basis for an award of prejudgment interest (288 F.Supp. at 865), was held inadequate since it did not show that the district court had considered *all* the factors which the Court of Appeals deemed relevant. Yet here, the Court of Appeals approved the award of pre-judgment interest although it could not know whether the District Court had considered *any,* much less all, relevant factors (or for that matter, factors

which were impermissible), and also could not even know that the District Court had exercised its discreton, and had not awarded prejudgment interest on the erroneous premise that it was required to do so.

This case also presents an important and recurring variant on the problem of findings concerning discretionary prejudgment interest awards—whether a Court of Appeals which substantially increases a judgment may award prejudgment interest on the total judgment, rather than remand to the trial court for renewed exercise of its discretion, in light of the changed circumstances, and if the appellate court may act, whether it must set forth the basis for its decision. Here, the Court of Appeals doubled the judgment, raising the interest to $350,000 and the entire total award against the defendants in excess of $1,400,000. Even if the original award of interest was proper, it by no means follows that the award on the much greater judgment still "is compensatory and * * * , in light of the substantial sum involved, [and] is in accord with 'fundamental fairness.'" *Norte & Co., supra,* 416 F.2d at 1191, following *Board of Commissioners, supra.*

Since it is the trial court's discretion which is called for, we submit, as do petitioners in *Bangor Punta Corp.* v. *Chris-Craft Industries,* now pending on petition for certiorari No. 75-355 (id. pp. 3, 33) that the court should have remanded the question of interest to the trial court for the exercise of that court's discretion. But if it was proper for the Court of Appeals to decide the issue in the first instance, that Court should surely have set forth the basis, if any, for its belief that the award was still equitable. Yet for aught that appears, that Court thought the award was

automatic given its approval of the trial court's (supposed) exercise of discretion on the original judgment. The award of such substantial sums without the slightest indication that the equitable standard declared by this Court has been followed is the antithesis of proper judicial procedure, and calls for correction by this Court.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

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STATUTORY APPENDIX

This case involves § 301 of the Labor-Management Relations Act of 1947, 61 Stat. 136, 156, 29 U.S.C. § 185, which provides in pertinent part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual members or his assets.
>
> * * *
>
> (e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court

shall find the facts specially and state separately its conclusions of law thereon * * * Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.* * * If an opinion or memorandum of decision is filed, it will be sufficient if the findings of the fact and conclusions of law appear therein. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDIX A

Opinion and Order of District Court on Liability (March 30, 1973)

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA

Civ. A. Nos. 68-1014, 69-1235

March 30, 1973

EAZOR EXPRESS, INC., a corporation, *Plaintiff*,

v.

The INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 249, *Defendants*.

DANIELS MOTOR FREIGHT, INC. and Eazor Express, Inc., *Plaintiffs*,

v.

LOCAL 377, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Defendants*.

* * * * * * * * * *

Opinion

TEITELBAUM, District Judge.

These are actions in which the plaintiff employers, Eazor Express, Inc. ("Eazor") and Daniels Motor Freight, Inc. ("Daniels"),[1] seek to recover damages for unlawful strikes

[1] At the time of the events complained of, Eazor, which had contracted to purchase all of the outstanding stock of Daniels, was operating Daniels by virtue of an authority of temporary control issued to it by the Interstate Commerce Commission. The transaction was eventually consummated on April 30, 1970. Moreover, Daniels' labor agreement provided that in the event another company assumed temporary authority of Daniels' operations, that company would assume the obligations of the agreement. Since

from the defendant labor organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("International") and two of its locals, Local 377 and Local 249. The jurisdictional basis of both actions, which were consolidated for trial,[2] is stipulated by all parties to be § 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185, as amended). Section 301 provides, in pertinent part, that,

> "[S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court. . . ."

The contracts alleged by the plaintiffs to have been violated are the National Master Freight Agreement, covering the period April 1, 1967 through March 31, 1970, to which the plaintiffs, the defendant locals, and the National Over-The-Road and City Cartage Policy and Negotiating Committee of the International ("National Committee") were parties, and the various supplements thereto, *viz.* (1) (a) the Joint Council No. 40, Freight Division, Over-The-Road Supplemental Agreement and (b) the Joint Council 40, Freight Division, Local Cartage Supplemental Agreement, both being between Eazor, the National Committee and Local 249, and (2)(a) the Central States Area Over-The-Road Supplemental Agreement, with Ohio Rider, and (b) the Central States Area Local Cartage Supplemental Agreement, both being between Daniels, the National Committee and Local 377, and (3) the National Iron and Steel and Special Commodities Supplemental Agreement.

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the rights of an agreement generally follow the obligations and, of course, since Eazor was operating Daniels under an authority of temporary control, for purposes of these actions at least, Daniels was essentially, and will be treated as, an operating subsidiary of Eazor.

[2] The trial, which was non-jury, was bifurcated. Consequently only the first stage, at which only evidence relevant to the issues of liability was adduced, has been completed. At this juncture, then, I will treat with and dispose of only the issues of liability.

The alleged violations of these contracts are strikes—one by Local 377 against Daniels (at all relevant times Local 377 was the exclusive bargaining agent for drivers, dock employees, and garage employees working out of or at Daniels' terminal at Warren, Ohio) and one by Local 249 against Eazor (at all relevant times Local 249 was the exclusive collective bargaining agent for drivers, helpers, and warehousemen working out of or at Eazor's terminal at Pittsburgh, Pennsylvania). The strikes began on August 20, 1968, when the members of Local 377 walked off their jobs at Daniels' Warren terminal. By the following morning, August 21, a picket line had been established at Eazor's Pittsburgh terminal which was not only honored but supported by members of Local 249. The ensuing strikes of both terminals, which were characterized by roving bands of pickets and notable violence, ended for Daniels on September 17, 1968, when the terminal was permanently closed [3] and for Eazor on September 25, 1968, when the members of Local 249 returned to work.

Neither strike was authorized or sanctioned, either by the respective local officials or by International officials, i.e., each was a "wildcat" strike.[4] Both, however, were admittedly violations of the "no strike" provision of the supplements to the National Master Freight Agreement which recites as follows:

> "The Union[s] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of [a] settlement, as provided for in this Agreement [and in the National Agreement, if applicable] of any controversy which might arise." [5]

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[3] The terminal has never been reopened.

[4] The term "wildcat" strike is interpreted differently by the parties to this action. I use it to mean a strike which is not authorized by union officials, rather than not authorized by the labor agreements.

[5] It is not disputed that neither of the two grievances which immediately precipitated the strike had been processed through all of the steps of the grievance machinery at the time of the strikes.

Accordingly, the contentions of the parties surround the issues of liability for any damages caused by the strikes. The International contends (1) that it is not a party to any of agreements and (2) even if it is, it did all that the agreements obliged it to do. Locals 377 and 249 deny liability (1) because the agreements provide that only specially designated stewards and alternates have authority to call strikes and that none of those so designated called the strikes, and (2) that the agreements provide that they shall not be held liable for the unauthorized acts of stewards and alternates generally.

The Daniels' Strike Was Not Authorized.

Locals 377 and 249 rely on Article 4 of the National Master Freight Agreement which provides as follows:

> "Job Stewards and alternates have no authority to take strike action . . . except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts."

Article 4 further, as the *quid pro quo* for the employers relinquishing of any rights it may have against the union for unauthorized work stoppages, vests in the employer the unquestionable authority to "impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action." The Central States Area supplements complement this provision.[6] Article 43, Section 2 of the Central States Area supplements requires the local union to furnish, within two weeks of the signing of the agreements, the employer with a list of its members who have the authority to act for the union in calling strikes, and provides (1) that the union "shall not be liable for

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[6] Probably inadvertently, the Joint Council No. 40 supplements do not. There is no contention, however, that the strike by Local 249 was called by anyone authorized to do so.

any activities unless so authorized" and (2) that in the event of an unauthorized strike the union "shall not be liable for damages." Article 43, Section 2 further, however, makes it mandatory for the union to,

> ". . . undertake every reasonable means to induce [striking] employees to return to their jobs during any [unauthorized strike]."

The representative designated pursuant to Article 43, Section 2 of the Central States Area supplements was John J. O'Neill, at all relevant times a business agent for and a vice-president of Local 377. The plaintiffs urge that O'Neill actually called the strike, and, resultingly, that the liability of Local 377 and the International is patent. The initial factual issue to be resolved, then, is whether or not the evidence supports the conclusion that O'Neill in fact called the strike in Warren.

Many of the events surrounding the inception of the strike in Warren are undisputed. On Saturday, August 17, 1968, the employment of Kenneth Roper, a garage employee of Daniels and a member of Local 377, was terminated because he refused a work assignment. On Monday, August 19, the employment of Jack Eckley, a driver employee of Daniels and a member of Local 377, was terminated similarly because he refused a work assignment. To attempt to resolve the outgrowing grievances of Roper and Eckley, meetings were held at Daniels' Warren terminal on the morning of August 20, between representatives of Daniels and of Local 377. In attendance at the meetings, among others, were O'Neill, the grievants, and Clyde Clark, a manager of Daniels.

The meetings not only proved fruitless, but served to inflame the antagonists. At the trial there was uncontroverted testimony of heated verbal exchanges and physical shovings. The testimony regarding the note on which the meetings concluded and the events which followed the meetings,

however, was not uncontested. Clark testified that as the meeting ended O'Neill said, "I'm giving you a seventy-two hour strike notice for your Ohio Southern Drivers." He testified that immediately after the meeting he saw O'Neill walking about the terminal and that within ten minutes of the last time he saw O'Neill, a driver named Gene Latta advised him that "the terminal was going to go out on strike."

O'Neill readily admitted walking about the terminal and, in fact, talking with the employees. He testified that it was his practice to mingle with the employees, at least those who were members of Local 377, when he visited a terminal; that he made it "a point [that day] because it was right prior to election"; and that he talked with the employees generally about "beefs" or grievances they had and about the meetings which had taken place that morning. But O'Neill denied that he threatened to call a strike. Rather, he testified that at the meeting he made "absolutely" no reference to Clark of a strike. Further, he testified that from the terminal he proceeded to "Huffman's", a truck stop which was located across the street from the terminal and talked with the members of Local 377 who were gathered there. He testified that, in fact, he talked there with Eckley about the meetings and that when Eckley suggested that he was going to start picketing, he counseled him "that he had better not". Notwithstanding his advice, however, later that afternoon Roper and Eckley, each with a little camp stool and a placard reading "Unfair Labor Practice", began to picket Daniels' Warren terminal and thus the strikes were precipitated.

Although the circumstances and the sequence of events are undeniably suspicious, I find, in the absence of evidence to contradict the testimony of O'Neill as to the essence of the text of his conversations with the employees both at the terminal and at Huffman's, and in the light of the substantially corroborative testimony of Bob Eliser and John

Arnold, two officials of Local 377 who were with O'Neill at times during the day of the inception of the strike, that he did not call the strike, and that, in fact, he cautioned against it. Therefore, since there is no evidence of designations of any other officials or members of Local 377 as having been conferred the authority to call strikes, I conclude that the strike was not authorized by Local 377. Cf. Blue Diamond Coal Co. v. United Mine Workers of America, 436 F.2d 551 (6th Cir. 1970).

EACH DEFENDANT'S OBLIGATION WAS TO USE "EVERY REASONABLE MEANS" TO END THE STRIKE

Alternatively, the plaintiffs seek to impose liability on Local 377, as well as on Local 249 and the International, on the theory that the agreements were breached in that every reasonable means to end the strike was not undertaken.[7] With respect to Local 377, the duty is express.

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[7] The plaintiffs have also pressed as a theory of at least Locals 377 and 249's liability, their vicarious responsibility for the "mass action" of their membership. This theory, first announced as a "principle of law" in United States v. United Mine Workers of America, 77 F.Supp. 563 (D.C.D.C.1948) and most recently invoked in Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S.Ct. 974, 28 L.Ed.2d 247 (1971), and Colt's Inc. v. Amalgamated Local 376, 314 F.Supp. 578 (D.C.D.Conn. 1970), holds that,

> ". . . as long as a union is functioning as a union it must be held responsible for the mass action of its members." United States v. United Mine Workers of America, *supra*.

I think the principle well conceived but inappropriate to this action simply because by the terms of the National Master Freight Agreement the plaintiffs have agreed to "not hold the Union liable for any unauthorized acts". See Adley Express v. Highway Truck Drivers and Helpers, Local 107, 47 F.R.D. 356 (D.C.E.D.Pa. 1969). To apply the "mass action" principle, which I perceive as making the union as an entity liable for the actions of any mass of its members with respect to any particular employer, in the face of the instant agreement would be to not only negate but rewrite its express provision to the contrary.

Article 43, Section 2 of the Central States Area supplements obligates the union to "undertake every reasonable means to induce employees [engaged in an unauthorized work stoppage] to return to their jobs". No similar provision, however, is contained in the Joint Council No. 40 supplement or the National Master Freight Agreement. If either, or both, Local 249 or the International is obligated to do likewise, then, the obligation must be implied. Moreover, since both Local 249 and the International are expressly not liable for unauthorized strikes, any such obligation must be implied without reliance on and quite apart from any principles of vicarious liability.[8]

Whether or not the obligation expressed in the Central States Area supplements is implicit in the Joint Council No. 40 supplements and the National Master Freight Agreement involves an interpretation of the agreements. The principles which control the interpretations of collective bargaining agreements were recently reviewed in Kellogg Company v. NLRB, 457 F.2d 519 (6th Cir. 1972). There, quoting from Refinery Employees' Union v. Continental Oil Company, 160 F.Supp. 723, 731 (D.C.W.D.La. 1958), it was stated *inter alia* that:

> "[C]ourts cannot make contracts for the parties, and can declare implied obligations to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effect the purposes of the parties. Before an obligation will be implied it must appear from the contract itself that it was so clearly in the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to give effect to and effectuate the purpose of the contract as a whole."

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[8] See n. 7.

If a duty to undertake every reasonable means to put an end to an unauthorized strike is to be implied, the main wellspring from which it must arise is the express duty of the unions, as entities, to refrain from striking the employers of its members. One of the premises central to the concept of collective bargaining, itself the cornerstone of labor-management relations, it that labor unions represent and bargain on behalf of their members. Labor unions ostensibly exist for the sole purpose of equalizing the obvious and socially intolerable imbalance of power between employer and employee which would prevail in their absence.

Concededly, the duty not to strike imposed by the agreements involved in this action inhibits only strikes called, authorized or comforted by the unions' officials. The duty is probably the most important one undertaken by the unions. As was observed in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), quoting from S.Rep. No. 105, 80th Cong., 1st Sess., p. 16,

> "[T]he chief advantage which an employer can reasonably expect from a collective [bargaining] agreement is assurance of uninterrupted operation during the term of the agreement."

The importance of the recognition by a union of that expectation with respect to "no-strike" provisions is both demonstrable and critical to industrial peace. Thus, labor agreements must always be construed with that expectation or end in mind. It would seem, then, that purely as a matter of interpreting the agreements with a view to effectuating the purpose of the contract as a whole, the employer having dealt with its employees collectively through their representative, it is reasonable to imply an obligation by their representative to take whatever reasonable measures are available and indicated to prevent or bring to an

end an activity engaged in by its members in which it as an entity is not free to engage.[9] The reasonableness of imposing this burden on the union is particularly apparent where, as here, the benefits of the concession exacted from the employer in return for the no-strike obligation, *viz.*, the agreement to submit grievances to final and binding arbitration,[10] inure directly to its members, indeed, as well as to those of its members who instigated the strike.

Additionally, as a matter of public policy it is desirable to impose an obligation upon a union to take steps to frustrate its members from doing that which it is contractually prohibited from doing as an entity. The emphasis which federal labor law and the policy underlying that law, places on the peaceful resolution through arbitration of industrial disputes, and the avoidance, wherever and whenever possible, of labor strikes,[11] particularly those involving violence, suggests that such an obligation be implied most needfully, and consequently most readily, in

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[9] That the implied obligation requires affirmative action to carry out, while the express obligation is merely to refrain from action is of no moment. The agreement imposes many duties upon the unions which require affirmative action. It is a "living" agreement; it is one which, unlike a contract calling for a single performance, is carried out by both sides daily during its effective term.

[10] See The Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970).

[11] See The Boys Markets, Inc. v. Retail Clerks Union, *supra*, n. 10; United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); and Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957).

instances of "wildcat" strikes.[12] Therefore, in conclusion, I think that a fair reading of the Joint Council No. 40 supplements, as well as the National Master Freight Agreement, in the context both of the meaningful effectuation of the purposes of the express provisions of the agreements, and of federal labor policy, requires the implication of an obligation upon both Local 249 and the International to undertake every reasonable means to induce "wildcat" strikers to return to work.[13]

NEITHER LOCAL EMPLOYED "EVERY REASONBLE MEANS" TO END THE STRIKE.

It is not disputed that the strikes, both of Daniels' Warren terminal and of Eazor's Pittsburgh terminal, were publicly denounced as illegal by each of the unions' officials. Nor is it disputed that O'Neill of Local 377 and Thomas Fagan, president of Local 249, told the strikers of their respective locals to return to work. O'Neill testified that he first learned of the strike on the evening of August 20, when he received a telephone call at home. He testified that that night he instructed Gene Martin, a union steward, to "tell those guys to get to work"; that the next morning he went to Daniels' terminal and told the men who were picketing there that "they better get back to work"; and that from there he proceeded to Huffman's where he told the men gathered there they "had better get back to work". He testified that he then returned to his office where he received a telephone call from Bill Pres-

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[12] Moreover, realistically, in the absence of such an implied obligation, without intending to impugn the integrities of any of the unions involved in this action, the way is clear for a union to furtively call for or encourage an activity while publicly disavowing it.

[13] See, *contra*, United Construction Workers v. Haislip Baking Co., 223 F.2d 872 (4th Cir. 1955), *cert. denied*, 350 U.S. 847, 76 S.Ct. 87, 100 L.Ed. 754 (1955).

ser of Joint Council No. 41; that Presser agreed to dispatch two men to assist him in his efforts to get the strikers back to work, which he did; and that the three of them went to Huffman's where they unsuccessfully tried to get the men to return to work. Further, he testified that about a week after the strike began he was advised by Presser that arrangements had been made to expedite the grievances of Roper and Eckley; that he reported the availability of the arrangements to the men on the picket line; and that the "offer" was unhesitatingly and resolutely rejected.

He testified further that there was a meeting on September 3, 1968, the principals at which were himself, Presser and a number of the strikers, including Martin, who was apparently one of the leaders of the strikers. At the meeting the men were told they had to go back to work before the grievances were processed. The men responded by inviting Presser to "go to hell". O'Neill had no recollection of other efforts during the remainder of the week of September 3 to end the strike, i.e., efforts *vis-a-vis* the members of Local 377.

The next meeting with the men took place on September 9. It was called by the union and was held at the union hall. It was attended by "just about every man from the company with the exception of those who were sick or on vacation", or by approximately 250 to 300 men. O'Neill testified that he presided over the meeting and that he urged all those in attendance to go back to work. He testified that the principal speaker at the meeting was an attorney, Bernard Berkman. He testified that Berkman also urged them to go back to work, but that they voted "almost to a T" to continue the strike. Thereafter, Daniels on September 17 discharged all of its striking employees and on September 18 permanently closed its Warren terminal. In sum, all of the efforts of the officials

of Local 377 to end the strike took the form of urgings or cajolings to the men to go back to work.

I do not think that the efforts of the union amounted to a discharge of its duty to undertake every reasonable means to effect the cessation of the strike. I think the evidenced policy of simply urging the men to return to work was far too timid. Many other and potentially more effective approaches were available to the union. O'Neill admitted the union's right to "lift a . . . member's 'book' ", yet it did not do so. Indeed, the evidence is that a number of the strikers worked for other companies during the strike. Most likely this would not have been possible had the union lifted the "books" of the strikers. Nor at any time during the strike were the strikers even threatened with discipline or fines, much less actually disciplined or fined. Further, at at least two meetings at the union hall of the strikers, O'Neill permitted only visual voting rather than voting by secret ballot.[14] In general and in short, the toughness with which the union officials approached their striking members was less than intimidating.

Whether or not any of the untaken tacks or unsummoned measures would have produced the cessation of the strike is unknowable. It is important only that they were reasonable, available, significant and potentially productive. I conclude, then, that Local 377 breached its labor agreement with Daniels in that it failed to undertake every reasonable means to induce the "wildcat" strikers to return to their jobs.

Local 249 not only had a like obligation, it discharged it with a like lack of imagination. Fagan testified that he first learned of the strike of the Eazor terminal in Pittsburgh on the morning of August 21. He testified that he

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[14] Interestingly, the strike by Local 249 was ended on the first secret ballot vote by the strikers.

proceeded immediately to the terminal where he "notified" the strikers of the illegality of the strike.[15] He testified further that his initial strategy, after failing in his personal attempts to persuade the strikers to return to work by request, was (1) to hold a meeting among Eazor's principals (Thomas and Robert Eazor), representatives from the International and Joint Council No. 40 (Norman Kegel and Daniel DeGregory), and the leaders of the strikers (William Gilmer and Robert McLallen),[16] at which he ordered the dissidents to return to work, and (2) to hold a meeting of the striking members of Local 249 at which he employed "all the persuasive ways that [he] could think of" to try to talk the men into going back to work. He testified that at the meeting of the strikers, which took place three days after the strike began, a "vote" was taken by a show of hands which was carried by those opposed to ending the strike. Neither meeting was fruitful.

Fagan testified further that on September 4, on his instructions, a letter was written to the International for the purpose of enlisting their assistance in getting the men to go back to work. In response the International sent three men to speak at another meeting of the strikers which Fagan arranged for September 14. At that meeting, attended by approximately 150 men, all three men sent by the International, as well as Fagan, implored the strikers to resume working. They told them that until they resumed working "there was no way that there could be any help forthcoming from the International". The men angrily rebuffed their pleas. Following that meeting, although there were a few meetings of small groups, there

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[15] In addition to honoring the pickets from Local 377, the men from Local 249 struck over their own long pending unresolved grievances regarding the maintenance of working standards.

[16] The latter two were steward and committeeman, respectively, for the over-the-road drivers at Eazor's Pittsburgh terminal.

were evidently no other mass meetings with the strikers until that of September 24 at which they voted, by secret ballot, to return to work. Fagan led the men back to work the next day.

Fagan testified, concludingly, with no specifics aside from his allusions to his commands to the men to return to work, that "at all times [he used his] best efforts in attempting to get [the] men back to work". He testified, too, that at the meeting attended by approximately 150 men he made veiled threats in the form of advising the men of the power of the union to fine, suspend or expel them for their illegal actions. He testified, however, that he never threatened either the stewards or the committeemen with removal.

I do not doubt that the mood of the strikers was ugly—that is perfectly evident from the violence which occurred during the strike. But that mood made bold, firm steps to return the men to work all the more imperative. I think that the circumstances called for the politics of power rather than the politics of persuasion. The contractual duty of the union went beyond merely beckoning the strikers back to work. It made it mandatory for the union to undertake every reasonable means, of course, available and indicated to cause the strikers to return to work. I think too many resources were available and indicated, including removing the stewards and committeemen who were leading and organizing the strike; insuring that no strikers were elsewhere employed (as in fact they were) during the strike by lifting their "books", or at least by forbidding their use of the union's hiring hall facilities in seeking other employment; imposing daily fines on all strikers; and taking "votes" by secret ballot, and were untapped. Consequently I conclude that Local 249 breached its labor agreement with Eazor.

THE INTERNATIONAL IS A PARTY TO THE NATIONAL MASTER FREIGHT AGREEMENT.

The plaintiffs lastly contend that in addition to Locals 377 and 249, the International violated the contracts. The International denies not only that it failed to live up to what would have been its obligations had it been a party to the contracts, but also that it is a party to them.

In a technical sense, the International's latter position is unassailable. It was not a signatory to the agreement; rather its "National Committee" was. The inquiry, then, must be into the relationship between the National Committee, the signatory to the agreements, and the International.

The authority for the National Committee originated with a resolution of the Executive Board of the International. The authority was granted for the purpose of accomplishing national bargaining and national agreements, which were deemed by the Executive Board to be in the best interests of all the members of the International. The actual creation of the National Committee was by way of a resolution of a "Conference of Representatives" from the International's local unions and joint councils. Finally, the National Committee was activated, at least in form, by virtue of a power of attorney from the International's unions.

Notwithstanding the formalities surrounding its creation, the National Committee is intimately associated with the International. At all relevant times its members were appointed by the president of the International pursuant to authorization from the Executive Board; many of its members were contemporaneous members of the International's Executive Board; it was chaired by the president of the International; its funding was controlled by the International; and the International conducts the ratification vote its constitution requires after a national accord with its members' employers is reached. The

National Committee has no status or shape as a labor organization independent of the International. It has no constitution or by-laws, and files no reports with the Department of Labor as it would be required to do if it were a labor organization. In short, it is organizationally and functionally an administrative arm of the International. Its sole purpose, to achieve national negotiations and national agreements, furthers the aims of the International. While it may act, in terms of the sophistries, on behalf of the local unions, in terms of the realities, it acts on behalf of the International. I conclude, therefore, that the International, through its National Committee, is a party to the labor agreements.[17]

THE INTERNATIONAL DID NOT EMPLOY "EVERY REASONABLE MEANS" TO END THE STRIKE.

As a party, the International's obligation, like Local 249's, is implicit. It derives from its commitment in the National Master Freight Agreement not to strike. There is no question that the International neither authorized nor sanctioned the strikes. Nor is there a question that it offered aid or comfort to the strikers. Rather, the issue is simply whether or not it reasonably and fully discharged its implied duty to exercise its powers to endeavor to get the men to go back to work.[18]

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[17] The International's contention that the "disclaimer" which appears at the end of each agreement which states that the International "approved [the agreement] as to form only" and,

> ". . . in doing so [assumed] no liability whatsoever under [the agreement] for the performance thereof or otherwise, and by such approval does not become a party to [it]"

conclusively relieves it of liability under the agreement is unpersuasive. If it is a party through its National Committee, any formal disclaimers are mere ineffectual contrivances.

[18] It is to be noted that the International's obligation, like Local 249's, is to undertake the means available to return its members to work. The obligation is not discretionary, but mandatory. There-

On August 21, 1968, immediately upon learning of the strikes, Frank Fitzsimmons, vice-president of the International, sent telegrams to Thomas Fagan and John Angelo (an officer of Local 377) which declared the strikes to be illegal and instructed them to return their men to work. Further, on August 21, Norman Kegel, an International organizer, went to the picket line at Eazor's Pittsburgh terminal and urged the men there to return to work. Other officials of the International were dispatched, including Presser to Local 377 and Albert Dietrich and William Neidig to Local 249, to assist the beleaguered local officials and at least Dietrich spoke to the striking members of Local 249 at the meeting of September 15. Two International officers, Walter Shea and Robert Flynn, testified that from the inception of the strikes the International was in contact with officials of the striking locals on almost a daily basis. These largely conciliatory efforts of the International culminated in a meeting at the International's offices in Washington, D. C., on September 17, at which the "riot act" was read to the strikers' leaders.

In light of its obligation, and of the gravity and endurance of the strikes, the International's undertakings to induce the strikers to return to their job were veritably negligible. The range of sources of persuasion available to it were fairly vast. Short of placing either of the locals in trusteeship, it could have directly threatened the strikers with fines, suspension or expulsion; it could have proceeded to impose fines, suspensions or expulsions (and have expedited such proceedings); it could have acted sooner in sending International representatives to urge the dissidents to step aside to allow the men to return to work. Further, those representatives who were sent could have

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fore it leaves no latitude for political or even good faith judgments as to what might and what might not be productive. The obligation is literally to employ "every reasonable means" to end "wildcat" strikes.

urged the return of the men to work in more forceful, uncompromising terms.

Additionally, it could have called a meeting of the leaders of the strikers in its Washington offices far sooner than almost one month after the strikes began, and it could have directed a vote of the strikers by secret ballot. Indeed, it was with the occurrence of these latter two events that the strike was brought to an end. In sum, then, the restraint with which the International went about making efforts to break the strikes, in the face of the urgency of the need for strong, unmistakably intended measures, I think compels the conclusion that the International, like Locals 377 and 249, breached its contractual obligation to the plaintiff to deplete, if necessary, its arsenal of all available means to halt the strikes.

An Order will be entered imposing liability on all three defendants, and the trial of these actions will proceed to the second phase, i.e., that of the issues of damages, including mitigation of damages, if any.

* * * * * * * * * * *

Order

And Now, to wit, this 30th day of March, 1973, in consideration of the foregoing Opinion, It Is Ordered that judgment as to liability only be and the same hereby is entered for the plaintiffs, Eazor Express, Inc. and Daniels Motor Freight, Inc. and against the defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its locals, Local 249 and Local 377.

It Is Further Ordered that the damage phase of this action shall commence on Monday, May 7, 1973 at 2:00 P.M. in Court Room No. 12, 10th Floor, United States Post Office and Courthouse.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

APPENDIX B

Opinion of District Court on Damages (June 10, 1974)

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA

Civ. A. Nos. 68-1014, 69-1235

June 10, 1974.

EAZOR EXPRESS, INC., a corporation, *Plaintiff*,

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 249, *Defendants.*

DANIELS MOTOR FREIGHT, INC., and EAZOR EXPRESS, INC., *Plaintiffs*,

v.

LOCAL 377, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *Defendants.*

Opinion

TEITELBAUM, District Judge.

In Eazor Express, Inc. v. Teamsters, et al., 357 F.Supp. 158 (W.D.Pa.1973), I found the defendant local unions and the defendant International liable under Section 301 of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 185 et seq.) for a work stoppage against plaintiff trucking company which lasted from August 20 until September 25, 1968. Although it was specifically found that neither the locals nor the International had authorized or ratified the wildcat strike, the unions were held liable for failing to perform according to their obligation to use all reasonable means at their disposal, both persua-

sive and punitive, to terminate the work stoppage.[1] Such an obligation was implied from the existence of a "no-strike" clause in the collective bargaining agreement between the parties.

The action had been bifurcated as to the issues of liability and damages and the above-cited Opinion dealt only with the issue of liability. In this Opinion, after a lengthy

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[1] In the first Opinion, I declined to premise defendant's liability on a "mass action" theory of union liability for wildcat strikes. See Section 301(e) of the LMRA and U.M.W. v. U.S., 177 F.2d 29 (D.C. Cir.), cert. denied, 338 U.S. 871, 70 S.Ct. 140, 94 L.Ed. 535 (1949). In light of the specific contractual provision in the agreement denying union liability for "unauthorized" acts, I felt that to apply the mass action theory "would be to not only negate but rewrite [the collective bargaining agreement's] express provision to the contrary." 357 F.Supp. at 163, n. 7. My reasoning in this regard has been adopted by Judge Edward R. Becker of the Eastern District of Pennsylvania in Adley Express Co. v. Highway Truck Drivers & Helpers Local, 365 F.Supp. 769, 778, n. 8 (E.D. Pa. 1973). Once it is understood that the fundamental underlying assumption of the Opinion on liability was regard for what may be called the sanctity of contracts (stated simply, if the union agrees not to strike in a signed contract, it should do everything within its power to prevent or terminate a strike should one occur), my disinclination to rewrite the parties' agreement becomes clear. Nevertheless, it is possible to reconcile the two approaches and view the mass action doctrine as an alternative basis for liability in this case. Recognizing that the seeming conflict between the two approaches turns on the interpretation of the word "authorized", if an authorized strike is interpreted to mean one in which union officials acquiesce and/or one which they fail to terminate by use of the reasonable means at their disposal, the defendants here are equally and alternatively liable under the mass action doctrine. Admittedly, my original interpretation of "unauthorized" in the collective bargaining agreement assumed that only those acts officially and formally sanctioned by union officials could be authorized, but further analysis leads to the realization that nothing precludes the above interpretation. See in this regard Wagner Electric Co. v. Local 1104, 361 F.Supp. 647 (E.D. Mo. 1973) and the excellent case note at 26 Vand. L. Rev. 1331 (1973).

hearing on the question and the submission of briefs by the parties, I consider the issue of damages.

Unlike a jury, which may award damages without substantiation of its reasons for arriving at a certain amount, the district court in such a situation is obliged to set out the rationale behind its damage awards. In such a case as this, where the weeks of testimony were filled with disputes over the intricate mysteries of accounting techniques, to set out in exhaustive detail the step-by-step financial contentions of either side would be a task of Augean [2] dimensions. Rather, I will proceed by setting out those broader principles to which I have adhered in a comprehensive examination of the minutiae of the parties' claims.

I recognize that damages, in a case such as this, can neither be proved nor found with precision. The party seeking damages must prove that the conduct which imposes liability upon another was a material cause of injury to the business or property of the claimant. Then, once the fact of injury is established, the trier of fact may make a reasonable estimate of damages. I distinguish between proof of the fact of damages and proof of the amount of damages. It seems to me that any other approach would work an injustice. For a clear and concise expression of this approach in a different context, see the Opinion of Judge Van Dusen in Edward C. Rea and 22 Ford Inc. v. Ford Motor Co., 497 F.2d 577, Third Circuit Court of Appeals filed April 26, 1974.

The fundamental rule to which I have adhered in awarding damages is the basic contract rule of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854): damages are recoverable only for those injuries that may be shown to have been within the contemplation of the defendant as occurr-

[2] An Augean task is one which is extremely difficult; a task reminiscent of Hercules' labor in cleaning the immense stables of King Augeas of Elis, which had not been cleaned for thirty years.

ing as a probable result of its breach. The foreseeability test is not, of course, to be taken literally: it does not mean that if the defendant contends that he was unable to predict that in the future what did happen would happen, the plaintiff should leave empty-handed. Rather, foreseeability is but a shorthand legal expression for the ascertainment of that *sine qua non* of all legal judgments, proximate cause, by means of hindsight. As stated in Corbin on Contracts, Vol. 5, § 1007, the foreseeability test is "the only substantial test of the legal requirements as to proximate causation and remoteness". Id. at 71.

John Stuart Mill described the cause of an event as the sum total of its antecedents, and in the ultimate, metaphysical sense his axiom is indisputable. But the law, with neither the inclination nor the infinite resources necessary for such weighty contemplations, cannot be concerned with ultimate causes. The very cornerstone of Anglo-American civil law is the principle that no person may recover except for an injury proximately caused by another.

Nor can there be any doubt that foreseeability is the test to be applied in the context of a Section 301 action for damages such as this. As stated in Wilson & Co. v. United Packinghouse Workers, 181 F.Supp. 809 (N.D.Iowa 1960):

> "In an action against a union under Section 301 for damages caused by a breach of a no-strike provision in a contract, the measure of damages recoverable is *the actual loss sustained by the plaintiff as a direct result of the breach.* U. E. W. v. Oliver Corp., 8th Cir., 1953, 205 F.2d 376, 388. Such loss would be that which may reasonably and fairly be considered as arising naturally from the particular breach of contract involved *and which may reasonably be supposed to have been in the contemplation of the parties at the time the agreement was entered into . . . .*" Id. at 820-821. (Emphasis added.)

In short, because a collective bargaining agreement is a contract and enforceable as such, the traditional criteria for the ascertainment of damages where a contract has been breached—foreseeability and proximate cause—are applicable. Williston on Contracts (3d ed. 1968) §§ 1020A and 1362.

I have taken pains to point this out for two reasons: first, because foreseeability and proximate cause are the fundamental tenets which I have borne in mind throughout my consideration of the question of damages in this case; and second, because repeatedly the parties seem to have lost sight of these principles in making their contentions before the Court. Both sides are equally guilty of this basic misconception of the theory of the lawsuit, but plaintiff's unfounded contention that "this case will not accomplish what it should accomplish unless the finding on liability is accompanied by a substantial damage award" is illustrative. In the first place, it would be plainly improper for this Court or any other to weight its damage award in a Section 301 action in one direction or another on the basis of some public policy it wished to further or deter. Moreover, what are sought here, as they must be under the terms of the LMRA are compensatory, not punitive damages. Int. Brotherhood of Teamsters v. Morton, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed.2d 280 (1964). This Court has based its damage award on the sole permissible standard for the award of damages in a Section 301 action —foreseeability and proximate cause. The remainder of the Opinion is constructed to exemplify the application of the Hadley v. Baxendale principle to the facts before the Court.[3]

The strike against Eazor took place in the period from August 20 until September 25, 1968. Primarily, it is for

[3] In accordance with F.R. Civ. P. 52(a), the foregoing shall constitute the Court's finding of fact and conclusions of law in this case.

losses sustained during this period that plaintiff seeks to recover. For the year 1968 Eazor lost, according to the figures of the Interstate Commerce Commission, $296,000.00. But an analysis of the plaintiff's books and records shows that the company had done fairly well in the first two quarters of 1968, and had in fact made a profit. Thus, the $296,000.00 figure is somewhat misleading, since the loss in the strike period was set off against and reduced by the profit made earlier in the year. Plaintiff submits and this Court finds that during the period August 20 to September 25, 1968, Eazor lost a total of $1,079,332.00. It is this figure which will be used as a starting point for the discussion of plaintiff's losses.

It should be noted at the outset that plaintiff seeks to be compensated for lost profits in this action as well as for the actual losses it sustained. Theoretically, the plaintiff's right to do so is unquestionable. If, in a hypothetical instance, it were to be shown that as the direct result of an illegal strike a company had lost $50,000.00 during a certain period and moreover had been deprived of the $50,000.00 in profits it would have made during that period, the correct measure of damages in such an instance would be $100,000.00. This case however does not present such an instance.

This case is comparable to the contrasting hypothetical situation wherein a company, damaged as the result of an illegal strike, demonstrates that it lost $50,000.00 during the period of the strike, but convincing evidence is introduced to show that the company would have lost $25,000.00 during that period under normal business conditions. Clearly, the proper measure of damages in the latter situation would be $25,000.00 and lost profits would not be includible as an item of compensation.

Here, as in the second example, plaintiff has failed to demonstrate that it would have made a profit during the relevant period and this Court finds that it would not have.

Without such conclusive proof, lost profits are not compensable. In addition, plaintiff seeks to recover what it terms "consequential losses". The company seeks to recover for these consequential losses both as a separate item of damages and as an aspect of its lost profits claim. That is, plaintiff contends that the consequential losses primarily took the form of lost business and asks the Court to infer that had that business "lost" been regained, the company would have made a profit. This Court finds that neither aspect of the consequential losses claim is compensable in this case. Plaintiff has failed to carry his burden of proof that (a) the consequential losses for the years 1969 and 1970 were proximately caused by the August/September 1968 work stoppage [4] or (b) that the company would have made a profit, absent the strike, in 1968, 1969 or 1970.

The evidence which is most illustrative of the reasoning behind the Court's findings in the Eazor firm's own language in its reports to its stockholders on a quarterly and annual basis. The Eazor shareholder reports succinctly document the Court's findings. Stated positively, the losses the company sustained in 1969 and 1970 were due to numerous causative factors other than the 1968 strike. Stated

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[4] A portion of Eazor's one-million dollar plus claim for consequential losses is made up of a claim for $263,702.00 in interest expense. The undeniable remoteness of this item in terms of causation is illustrative of the plaintiff's failure to demonstrate that any portion of its consequential losses claim was caused by the strike. In August of 1970, two years after the strike, Eazor's prime lender refused to extend credit to the company and Eazor was forced to seek out another bank. At the second bank, the company agreed to pay interest at a rate 9% above prime, whereas at the time of the strike its original bank had charged only ½% above prime. It is patently clear that to award the company the interest differential it seeks would be to allow it to recover for the most remote, conjectural and speculative of losses sustained. Simply because a loss occurred after the strike does not necessarily mean it was caused by the strike. Plaintiff has failed to prove which, if any, post-strike losses were caused by the strike.

negatively, this Court finds that plaintiff has failed to sustain its burden of showing that any losses other than those sustained during August and September of 1968 were caused by the strike.[5]

In the first two quarterly reports for the year 1968, Eazor reported substantial sales increases and in both reports expressly attributed this auspicious financial development to the integration of their operations with those of the recently acquired Daniels Motor Freight Company. The quarterly report for the three-month period ending September 30, 1968, the period which included the work stoppage, reads in relevant part as follows:

> "To Our Fellow Stockholders:
>
> Sales in the third quarter of this year increased $1,441,109 and in the first nine months $10,822,363. This increase is attributed to the acquisition of Daniels Motor Freight, Inc., plus growth in our other areas.
>
> Unfortunately we suffered an illegal strike lasting from August 20th to September 25th which started with our Daniels drivers and was very costly to your

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[5] The findings that (1) no loss incurred after the end of calendar year 1968 is attributable to the strike and that (2) the losses sustained by Eazor during 1969 and 1970 were due to numerous causative factors are further borne out by Eazor's own statements in a brief submitted to the Internal Revenue Service in the summer of 1970:

> "While Eazor Express, Inc. showed increasing profits for many years, it must be made quite clear that this trend peaked out in 1965 . . . [T]here had been a *drastic downward trend in earnings starting in 1966*. . . . The point we are trying to make here is that Eazor's ability to generate profits began to deteriorate well before [October 1967].
>
> In fact, following the trend through, *we are certain that Eazor . . . would have experienced a sizable loss in 1968 even without the burden of the strike in the fall* of that year, and had Daniels not been acquired." (Emphasis added.)

company, resulting in a deficit of $722,516 for the third quarter and $552,507 for the nine months.

In order to protect our stockholders, our customers and our employees from possible recurrent, unauthorized work stoppages at any interval in the future, *we could not settle grievances by any procedure other than the procedure in the union contract and we did not. . . .*[6]

Through the courts we were successful in obtaining injunctions and restraining orders against picketing. Prior to the strike we had two break-bulk terminals, one at Daniels at Warren, Ohio, and the other at Eazor Express, Pittsburgh where miscellaneous shipments were reloaded on trailers going to ultimate destination terminals. It was our intent to gradually phase out Warren both as an economy move and to improve service to our customers. The illegal strike hastened this and Warren is now closed, eliminating the lengthy delay of going through the various steps in the contract. . . .[7] We will not tolerate unauthorized strikes and we believe the closing of the Warren terminal will eliminate this problem in the future.

Our operations quickly returned to normal when we went back to work and we have regained all of our customers. . . ."[8]

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[6] See pp. 849-851, *infra*.

[7] This statement is illustrative of a point fully substantiated in the record that, contrary to plaintiff's assertions, the effects of the strike were not solely deleterious but, as in this instance, beneficial, resulting in financial and operating benefits to the company.

[8] This statement is of course directly contrary to plaintiff's attempted assertion that it not only lost business as a result of the strike but lost such business irrevocably. Eazor presented one witness in this regard whose testimony was inconclusive at best. I find expressly that plaintiff did not lose business and/or profits as a result of the strike. See pp. 7-8, *supra*.

The 1968 annual report essentially repeats the above assertions in less detail, without contradiction of anything in the 1968 third quarter report. The first quarter report for the period ending March 31, 1969, the fiscal period immediately following the strike, reads in pertinent part as follows:

> "To Our Fellow Stockholders:
>
> Sales in the first three months of 1969 decreased $625,276 over the same period last year due to the serious decline in our traffic caused by the east coast pier strike. Severe winter weather in the New England, New York and New Jersey areas also contributed to this unfavorable showing. Some roads were impassable, seriously affecting our operations, and one of our terminals had to remain closed for a few days until snow could be cleared from roads in the area. . . ."

Significantly, the August/September 1968 work stoppage is not even mentioned as a cause of the loss occasioned during the first post-strike fiscal period. Nor is any mention made of any continuing after-effects of the strike in any Eazor shareholder report therafter except for that in the September 30, 1969 quarterly report when the results for the two years are compared, and that in the 1969 annual report where the 1968 strike is listed along with the tight money market, rising interest rates and equipment defects as *one of* the causes for the firm's loss in that year. Plaintiff's own stockholders' reports substantiate this Court's finding that no loss incurred by Eazor after the end of calendar year 1968 has been shown by a fair preponderance of the evidence to be attributable to the strike.

Starting Point for Damages

As stated above, the $1,079,332.00 figure provides the starting point for the Court in its computation of damages. The problem with computing damages in a Section 301 action, as any district court judge who has wrestled with

the problem will attest, is simply that damages in such a context are not susceptible of proof with mathematical exactitude. By the same token, neither are they susceptible of disproof with precision. The court is left to fashion a damage award according to its sound judgment after application of the relevant legal principles. The difficulty of this process is highlighted when two specific problems—the starting date of defendants' liability and mitigation of damages are discussed. The liability of the defendant unions was based primarily [9] upon the failure of Locals 377 and 249 and the International to deplete their "arsenal of all available means to halt the strikes". 357 F.Supp. at 169. Defendants argue, with persuasive effect, that a necessary correlate of this basis of liability is that there must be some time lag between the inception of the strike and the point at which they were called upon (and failed) to exert all reasonable efforts to end the strike. I agree. The primary basis for defendants' liability is therefore amplified to recognize the obvious fact that the leaders of the three defendant unions could not have been required to bring forth their most potent weapons immediately upon notification of the strike. In such a situation it is reasonable to assume, as the union defendants no doubt did assume at the time, that the "persuasive" measures taken upon being notified of the outbreak of the strike (informing the strikers of the illegality of the walkout and urging them, without calling into play effective sanctions, to return to work) would be effective in ending the strike. Thereafter, a certain period of time, which the Court is willing to set in this fact situation but which it does not wish to have interpreted as an ironclad rule under all circumstances, must be allowed to pass in order to permit union leaders to ascertain whether or not their diplomacy has been effective. When the point is reached where it would become obvious to reasonable men that their persuasive efforts had failed, then defendants were required to escalate their response to include those more forceful actions listed in the previous Opinion.

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[9] See footnote 1, *supra*.

Having recognized that a differentiation should exist between the start of the strike and the beginning of defendants' liability, it becomes necessary to resolve two problems which arise as a result of that decision. The first question is whether, under this state of facts, there is any difference as between the three defendant unions as to the starting point of liability. Analysis of the Court's findings of fact as to when each respective union entity was informed of the wildcat strike and as to when each began to take action (357 F.Supp. at 165-169) establishes that the answer to this question must be no. The latest that any union official with responsibility in this matter learned of the strike was the morning of August 21, 1968, picket lines having been established the previous day. Thereupon, the actions taken almost immediately by the officials of Local 377 and Local 249 and by officials of the International were virtually indistinguishable. Each entity informed those within its charge of the illegality of their action and urged the men to return to work. Within a certain period of time it was, or should have been, patently obvious to officials of each of the union entities that resort to "the politics of persuasion" had been unavailing.

The second problem is ascertainment of the length of time in which it should have become obvious that halfway measures had failed. I have inferred such a time period from the evidence on the record. Since I am aware that such a time differential must be expressed in mathematical terms in order to facilitate the formulation of damages, I have determined that, under the facts of this case, such a period extended for forty-eight hours.[10] Assuming that

[10] The risk which arises from traveling such a course is that setting of a specific time period will be taken for something other than what it is, an inference drawn from the exhibited actions of defendants under all the facts and circumstances of this specific case. The risk is that it will be taken for a rule which states that if, within 48 hours after the start of the strike, the first efforts of union officials to end an unauthorized work stoppage have not borne fruit, those officials who fail to take more forceful measures to end the strike will be held liable in damages. Nothing could

each day of the 36-day strike accounted for a proportionate increase in damages, I have reduced the measure of damages accordingly.

MITIGATION OF DAMAGES

According to the Restatement of Contracts, § 336:

> "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."

In keeping with this fundamental principle of contract law, once a breach of the contract, the strike, occurred, Eazor had an obligation to take reasonable steps to mitigate damages flowing from the breach and to refrain from any action which would aggravate an already exacerbated situation and increase the measure of damages. Williston on Contracts, (3d ed. 1968), § 1353. This Court finds that Eazor did not comport itself in accordance with that legal standard and therefore reduces the measure of damages accordingly.

Bearing in mind that in a hard-nosed business, a hard-nosed attitude on the part of management is often thought necessary, this Court cannot sanction Eazor's behavior in failing to take any effective steps whatsoever to hasten an end to the strike. A tough-minded attitude toward labor negotiations is one thing; the complete absence of any evidence of a flexible spirit of conciliation and compromise is quite another. The evidence shows that once a strike had gone on for some time, Eazor failed to exhibit even that modicum of reasonableness necessary for achieving labor peace.

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be further from my mind than setting such a rule. The conduct of human affairs in general, and labor relations in particular, are not activities which may be divided into segments, computerized and set out onto timetables. Individual judgment by responsible leaders and the freedom of those in authority to pursue reasonable alternative courses of action must be preserved.

On September 3, 1968, when the strike had been in effect for two weeks, representatives of the unions met with Eazor representatives in an effort to settle the strike. The September 3 meeting was held at the urging of the Honorable Thomas D. Lambros, United States District Judge for the Northern District of Ohio. The unions sought to have the striking employees return to work and to submit to arbitration the question of whether Roper and Eckley, the strike leaders whose discharge had triggered the strike, had been properly discharged, along with the underlying questions of work rules and conditions. Eazor took the position that the fate of the discharged employees was non-negotiable until all employees who had not been discharged[11] returned to work. Thereafter, the situation deteriorated and the strike continued for three more weeks.

On September 9, Eazor discharged five more employees, the shop stewards and committeemen of Local 249. On that same date, Eazor proposed that all remaining employees, not including those it proposed to put on a three-month suspension, return to work with the same condition attached—that the status of discharged employees was final and not subject to arbitration. The unions refused to accept this solution. On September 17, Eazor discharged seventeen more Local 377 employee members and permanently closed its Warren terminal.

This scenario is not meant to stand as a blanket condemnation of Eazor's bargaining stance which in and of itself amounts to a failure to mitigate damages. As stated in In Re Kellett Aircraft, 186 F.2d 197 (3d Cir. 1950):

> "Whether or not the buyer's obligation to mitigate damages has been discharged depends on the reasonableness of its conduct. In this connection, reasonable conduct is to be determined from all the facts and

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[11] On August 22nd and 23rd, twenty-six Eazor employees had been discharged for their participation in the unauthorized work stoppage.

circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice cannot complain that one rather than the other was chosen. The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interest of the defaulter to his own probable detriment." Id. at 198-199.

This Court finds, under all the facts and circumstances of this case, that plaintiff failed to mitigate damages. Such a finding does not center solely upon plaintiff's discharge of striking employees, for plaintiff's rights in that regard are specifically defined in the law (see N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938)) and in the contract between the parties. On the other hand, it must be noted that Eazor's continued adherence to a hard-line course of retribution and obstinacy might well have been foreseen to achieve nothing more than what it did achieve—a strengthening of the feeling of solidarity which already motivated the workers.

Nor does the finding of failure to mitigate damages center solely upon Eazor's refusal to accept the unions' September 3 settlement proposal. As pointed out in In Re Kellett Aircraft, no one can say with certainty, even in hindsight, what course of action was best for plaintiff's interests at the time. But it can be said with certainty, and this Court so finds, that acceptance of the unions' September 3 settlement proposal and/or refraining from discharging any or all striking employees would have been reasonable efforts on plaintiff's part which would not have caused plaintiff undue risk, expense or humiliation. Once the

strike had been ongoing for some time, it was the responsibility of *both* parties to earnestly seek resolution of their difficulties.

In addition to the reduction in damages for failure to mitigate damages and in keeping with setting a reasonable starting point for damages, there is one specific item of damages which plaintiff has failed to prove was proximately caused by the strike, and thus an item for which he may not be compensated—legal expense. In computing its estimate of Eazor's operating loss for August/September 1968, plaintiff includes an item for $52,108.00 in legal expenses. While it is true that legal expenses which directly relate to terminating a work stoppage, as opposed to those which relate to seeking damages sustained as a consequence of such work stoppage, are recoverable (Sheet Metal Workers, Local 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 110 (9th Cir. 1967)), plaintiff has failed to sustain its burden of proving what portion, if any, of the legal expenses it incurred were directly related to ending the strike. To base an award of attorney's fees in a Section 301 action upon plaintiff's unsubstantiated submission of its bills from counsel would be impermissible speculation.

Thus, starting from a base of $1,079,332.00, the demonstrated loss for August and September of 1968, I subtract $52,108.00, to yield a figure of $1,027,224.00. Next, the amount of damages attributable to that initial period during which defendants' duty to exhaust all reasonable efforts toward ending the strike had not yet been activated must be subtracted. Assuming that defendants' duty was not activated until a maximum period of 48 hours had passed, the amount to be subtracted may be expressed as 2/36 of the whole, since the work stoppage lasted a total of 36 days. Expressed as a percentage, 2/36 equals .056. Thus, subtracting $57,524.54 (.056 x $1,027,224.00) from the total damages mathematically accounts for that period in which defendants' duty to exhaust all reasonable efforts had not

yet arisen. The result of such computation yields damages in the amount of $969,699.46.

I find that only .528 of the above figure or $512,001.32 is due plaintiff as compensatory damages. This proportion is arrived at by taking September 9, 1968, the date on which plaintiff responded to defendants' settlement offer, as the final point for plaintiff's damages. On September 9, the strike was 19 days old and .528 is the percentage expression of 19/36. After September 9, 1968, I find that plaintiff's failure to mitigate damages was the cause of any harm done to the company.

I find further, on the basis of the percentage breakdowns submitted by plaintiff, that Local 249 is liable for 63.5% of this amount or $325,120.84, and that Local 377 is liable for 36.5% of the total or $186,880.48. These figures reflect the proportion of damage incurred by Eazor and Daniels respectively, considered as separate entities, as a result of the strike. Since there are two separate contracts involved in this case, one between Eazor and Local 249 plus the International and one between Daniels and Local 377 plus the International, neither local can incur liability for breach of the other local's contract. Thus, Local 249 is liable only for damages caused by breach of the contract with Eazor and Local 377 is liable only for damages caused by its breach of the contract with Daniels.

The International of course was under contractual agreement with both Daniels and Eazor simultaneously and has been found, in the Opinion on liability, to have been in breach of its contractual obligations. The International and Local 249 were bound jointly on the contract with Eazor and the International was bound jointly with Local 377 on the contract with Daniels. Thus, the International's liability for $512,001.32 is joint and several with that of the two locals.

An appropriate Order in accordance with this Opinion shall be entered.

APPENDIX C

Order of District Court on Damages (June 10, 1974)

Order

AND NOW, to wit, this 10th day of June, 1974, in accordance with the foregoing Opinion in the above-captioned case, IT IS ORDERED that judgment is entered in favor of plaintiff and against defendant Local 249 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America jointly in the amount of $325,120.84 and that judgment is entered in favor of plaintiff and against defendant Local 377 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America jointly in the amount of $186,880.48. Both amounts are to include interest at the rate of 6% per annum from September 25, 1968 until June 10, 1974.

/s/ HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
United States District Judge

APPENDIX D

Opinion of Court of Appeals (July 31, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1759, 74-1760, 74-1761, 74-1762

EAZOR EXPRESS, INC. and DANIELS MOTOR FREIGHT, INC.,
Appellants

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA: INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249; and LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Cross-appellants*

(District Court Civil Actions 68-1014 and 69-1235 consolidated)

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 29, 1975

Before MARIS, VAN DUSEN and GARTH, *Circuit Judges*

OPINION OF THE COURT

(Filed July 31, 1975)

By MARIS, *Circuit Judge*

Before us for decision are appeals by both the plaintiffs and the defendants hereinafter named from a final judgment entered by the United States District Court for the Western District of Pennsylvania in two consolidated civil actions brought under § 301 of the Labor Management Relations Act. 29 U.S.C.A. § 185. One of the suits was brought by Daniels Motor Freight, Inc. (herein "Daniels") and Eazor Express, Inc. (herein "Eazor") as plaintiffs, against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Teamsters International Union") and its Local Union No. 377 (herein "Local 377"), as well as against certain individuals not involved in these appeals, as defendants, and was originally filed in the Court of Common Pleas of Trumbull County at Warren, Ohio, promptly removed by the defendants to the United States District Court for the Northern District of Ohio, and subsequently transferred by the latter court to the District Court for the Western District of Pennsylvania. The other suit was brought by Eazor, as plaintiff, against the Teamsters International Union and its Local Union No. 249 (herein "Local 249"), as well as against certain other labor organizations not involved in these appeals, as defendants, and was filed in the District Court for the Western District of Pennsylvania. The suit brought originally in Ohio sought both injunctive relief and damages for losses alleged to have been suffered by the plaintiffs as the result of an unauthorized strike by certain of plaintiffs' employees who were members of Local 377. The suit brought in the Western District of Pennsylvania sought only damages for the losses alleged to have been suffered as the result of an unauthorized strike by certain of plaintiffs' employees who

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were members of Local 249. By order of the district court the actions were consolidated as a single action for trial and they will be treated as a single case for the purposes of our discussion.

The facts out of which the controversy arose may be summarized as follows. The unauthorized strikes giving rise to the litigation took place from August 20 to September 17, 1968 at Warren, Ohio and from August 21 to September 24, 1968 at Pittsburgh. Eazor and Daniels were both motor freight carriers, Eazor having a breakbulk commodities terminal in Pittsburgh and Daniels having a breakbulk terminal in Warren, Ohio. Prior to 1968 Eazor contracted to purchase all the stock of Daniels and during that year Eazor operated the Daniels business pursuant to an interim order of the Interstate Commerce Commission. Final approval of Eazor's acquisition of the Daniels stock was given by the Commission in 1970 and Daniels was actually merged into Eazor in 1972.

In 1968 the drivers and dock workers at Eazor's Pittsburgh terminal were members of Local 249 of the Teamsters International Union and the drivers, dock workers and garage employees at the Daniels terminal in Warren were members of Local 377 of that union. Eazor, Daniels, Local 249 and Local 377 were parties to the National Master Freight Agreement which was in force between April 1, 1967 and March 31, 1970. This agreement had been entered into between the National Over-the-Road and City Cartage Policy and Negotiating Committee (herein the "National Union Committee") of the Teamsters International Union and a corporation known as Trucking Employers, Inc., representing Eazor, Daniels and most other American motor freight carriers. To this master agreement there were various regional supplements binding upon certain employers and local unions. The Teamsters Joint Council No. 40 Freight Division Over-the-Road Supplemental Agreement and the Teamsters Joint Council No. 40 Freight Division Local Cartage Supplemental Agreement were the

supplements binding on Eazor and Local 249. The Central States Area Over-the-Road Motor Freight Supplement with Ohio rider and the Central States Area Local Cartage Supplemental Agreement bound Daniels and Local 377. The district court held that the National Master Freight Agreement and its supplements also bound the Teamsters International Union, a disputed question in the case which we shall discuss later.

The supplemental agreements each contained substantially the following no-strike clause:

> "The Unions[1] and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement, [and in the National Agreement, if applicable,[2]] of any controversy which might arise."

On August 17, 1968 Daniels discharged Roper, a garage employee and member of Local 377, and on August 19th Eckley, a road driver employee and union member, each for refusal of a work assignment. On the morning of August 20th meetings were held in Daniels' Warren terminal to attempt to resolve the grievances of Roper and Eckley arising from the termination of their employment. In attendance, among others, were Roper, Eckley, O'Neill, Vice-President and business agent of Local 377, and Clark, the terminal manager for Daniels. The meetings proved fruitless and in the afternoon Roper and Eckley began picketing the terminal. The members of Local 377 then walked off their jobs and the strike at Warren began. The next morning, August 21st, members of Local 377 from Warren appeared at the Eazor terminal in Pittsburgh and established a picket line there which the members of Local 249 employed by Eazor thereupon refused to cross.

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1. In the Central States Area Over-the-Road Motor Freight Supplement the word "Unions" at this point appears as "Union", apparently as the result of a typographical error.

2. The bracketed clause appears only in the two supplemental agreements to which Local 377 was a party.

It is conceded by all parties that Roper and Eckley did not exhaust the grievance procedure provided by the agreement and supplements in force between Local 377 and Daniels and that the strikes which began in Warren on August 20th and in Pittsburgh on August 21st were unauthorized by the unions and in direct violation of the no-strike clauses of the supplements to the National Master Freight Agreement to which they were parties. However, the local union stewards and committeemen at the Warren and Pittsburgh terminals took no steps to dissuade their fellow employees from striking or to induce them to return to work. On the contrary, they not only aided and abetted them but openly organized the strikes and led their members in conducting them.

The position of the unions, particularly Local 377, with respect to the strikes is less clear. There is no doubt that officers of the two local unions and of the Teamsters International Union repeatedly characterized the strikes as unauthorized and illegal and made a series of appeals, both written and verbal, to their striking members to return to work. Such appeals were made by O'Neill, the Vice-President and business agent of Local 377, among others, but the evidence is conflicting as to whether in fact O'Neill did not at the outset direct, or at least encourage, the walk-out at Warren on August 20th. The district court found as a fact, however, that he had not done so, a finding which the plaintiffs assert was clearly erroneous and which we shall discuss later. It does not appear, however, that the unions took any action seeking to terminate the strikes more drastic or compelling than written and verbal urging of their members to return to work. No steps whatever were taken to remove or restrain the local union officers at the terminals, the stewards and committeemen, who were leading the strikers.

The strikes were characterized by an accelerating pattern of violence which persisted, despite efforts to enforce injunctions issued by the Court of Common Pleas at

Pittsburgh[3] and the United States District Court at Cleveland[4] to control it. The violence included commandeering on the highway plaintiffs' drivers not involved in the strikes and compelling them to abandon their equipment, large scale destruction of Eazor equipment, threats of violence, and shootings and, finally, on September 16th an open assault by hundreds of persons on a convoy of Eazor trucks operated from the Pittsburgh terminal under police protection pursuant to a specific order of the Court of Common Pleas. Eleven of these persons, all members of Local 249, were arrested, convicted and imprisoned for criminal contempt by the Court of Common Pleas.

Within two or three days of the commencement of the strike at Warren, Daniels discharged Eugene Martin, the road steward, Bates, the city driver steward, and Merlin Martin and Arnold, union committeemen, and 26 other employees. On September 3d, urged by Judge Lambros, who was conducting the proceedings for a preliminary injunction in the United States District Court in Cleveland, the parties met to attempt a settlement of the strike. The union officials proposed that Daniels permit all the employees to return to work without penalty including Roper and Eckley whose reinstatement would be subject to determination through the grievance procedure. Daniels rejected this offer and indicated that it was unwilling to negotiate the status of the discharged employees until the employees not discharged returned to work. However, the evidence clearly shows that, contrary to the finding of fact by the district court which will be discussed later, shortly after this meeting the plaintiffs offered to reinstate all the Local 377 strikers who had been discharged except Roper, Eckley, the stewards and the committtee-

3. The injunction was issued by the state court on a complaint filed by Eazor in that court.

4. The injunction was issued in that one of these consolidated suits which was originally brought in the Court of Common Pleas of Trumbull County, Ohio and removed to the United States District Court at Cleveland. As we have stated, that suit then sought injunctive relief as well as the damages which are the subject of the judgment here appealed from.

men, but this offer, which was recommended by O'Neill and the striking union members' counsel, was rejected by the strikers at Warren. On the same day Eazor at Pittsburgh discharged Gilmer, the road steward, McLallen, the road committeeman, and Jeffress, a member of Local 249. Daniels and Eazor then sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11th and with a three-day penalty for each day's participation in the strikes if they returned on September 16th. The strikers, however, rejected this offer and on September 17th Daniels sent letters of discharge to 157 striking employees at Warren and permanently closed its terminal there. On September 24th the striking members of Local 249 took a vote, for the first time by secret ballot, and voted to return to work. The next day, September 25th, they went back to work at the Pittsburgh terminal and the strike there was over. The strike at Warren had ended with the permanent closing of the terminal there on September 17th. Following the end of the strike at Pittsburgh, Gilmer, the road steward, McLallen, the road committeeman, and Jeffress, a union member, were permitted to return to work pending the conclusion of grievance procedure. By an arbitral award under that procedure the discharge of Gilmer and McLallen was upheld and that of Jeffress vacated.

The trial was bifurcated by the district court. The issue of the liability of the defendants for damages to compensate the plaintiffs for losses alleged to have been suffered as a result of the strikes was tried first. Following that trial the district court filed an opinion holding that while Local 377, Local 249 and the Teamsters International Union were not responsible for calling the illegal strike, they were, nevertheless, liable for some of its consequences because they breached their contractual obligation to use every reasonable means to terminate it. 1973, 357 F. Supp.

158. Thereafter, the court held a trial on the issue of the amount of damages to be awarded. Extensive evidence on this subject was introduced and will be the subject of later discussion. Following the trial on this issue the court filed an opinion awarding to Eazor $325,120.84 against the Teamsters International Union and Local 249 and to Daniels $186,880.48 against the Teamsters International Union and Local 377. 1974, 376 F. Supp. 841. Asserting that the court erred in excluding from its awards of damages large items of loss which they had proved, the two plaintiffs have appealed in each action. Appeals Nos. 74-1759 and 74-1761. Likewise, the three defendants have appealed in each action, urging that the court erred in imposing liability upon them and in any case in fixing the amount of the award of damages. Appeals Nos. 74-1760 and 74-1762.

We turn now to consider the issues raised by these appeals. The first question to which we address ourselves is raised by the Teamsters International Union which urges that the district court erred in holding that it was a party to the National Master Freight Agreement and its supplements. Those agreements were actually signed by the National Union Committee. The Teamsters International Union argues that in executing the contract the National Union Committee was acting merely as attorney in fact for the local unions. As to this, the district court said:

> "In a technical sense, the International's latter position is unassailable. It was not a signatory to the agreement; rather its 'National Committee' was. The inquiry, then, must be into the relationship between the National Committee, the signatory to the agreements, and the International.
>
> "The authority for the National Committee originated with a resolution of the Executive Board of the International. The authority was granted for the purpose of accomplishing national bargaining and na-

tional agreements, which were deemed by the Executive Board to be in the best interests of all the members of the International. The actual creation of the National Committee was by way of a resolution of a 'Conference of Representatives' from the International's local unions and joint councils. Finally, the National Committee was activated, at least in form, by virtue of a power of attorney from the International's unions.

"Notwithstanding the formalities surrounding its creation, the National Committee is intimately associated with the International. At all relevant times its members were appointed by the president of the International pursuant to authorization from the Executive Board; many of its members were contemporaneous members of the International's Executive Board; it was chaired by the president of the International; its funding was controlled by the International; and the International conducts the ratification vote its constitution requires after a national accord with its members' employers is reached. The National Committee has no status or shape as a labor organization independent of the International. It has no constitution or by-laws, and files no reports with the Department of Labor as it would be required to do if it were a labor organization. In short, it is organizationally and functionally an administrative arm of the International. Its sole purpose, to achieve national negotiations and national agreements, furthers the aims of the International. While it may act, in terms of the sophistries, on behalf of the local unions, in terms of the realities, it acts on behalf of the International." 357 F. Supp. at pp. 167, 168.

We fully agree with these conclusions. It is true that after all the signatures on the supplements to the National Master Freight agreement the following appears:

"This Agreement is approved as to form only by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in doing so the International Union assumes no liability whatsoever under this Agreement for the performance thereof or otherwise, and by such approval does not become a party to the Agreement.

APPROVED:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Frank E. Fitzsimmons,
General Vice President"

As to this, it is sufficient to say that while it may well be that the Teamsters International Union did not become a party to the Agreement *by executing the foregoing approval as to form,* it is clear that it did become a party through the execution of the Agreement and supplements by its own administrative arm or agency, the National Union Committee. We need only add that we see no merit whatever in the contention of the Teamsters International Union that even though it must be regarded as a party to the agreement and its supplements through the relationship of the National Union Committee to it, the parties did not intend that it should have any obligation under the no-strike clauses in those supplements. The no-strike clauses were the fruit of negotiations between the motor carriers of the country and the International Union acting through its National Union Committee. They were perhaps the most important product of those negotiations so far as the motor carriers were concerned. It is inconceivable that it was not understood by all that by those clauses the International Union, as well as its various subordinate local unions, was undertaking to assure the carriers a period of three years of industrial peace.

As we have indicated in our statement of the facts, all of the supplemental agreements to which the Teamsters International Union and Locals 249 and 377 were parties contained virtually identical no-strike clauses. Under these clauses the unions agreed that there should be no strike against Daniels or Eazor without first using all possible means of settlement as provided by the grievance procedure set out in the agreement and supplements. Admittedly the grievance procedure was not exhausted prior to the strikes with which we are here concerned. The unions urge that these strikes were commenced wholly on the initiative of the plaintiffs' employees, admittedly all members of one or the other of the local unions, and were not authorized or called by the unions or by those officers of the unions who were authorized to take such action. There does not appear to be serious dispute as to this with respect to the Teamsters International Union and Local 249. But the plaintiffs urge that the evidence, fairly considered, established that the strike of Local 377 members at the Daniels terminal at Warren was, in fact, authorized and called by John J. O'Neill, Vice-President and business agent of the local union, who was the union officer authorized to do so. The unions concede that O'Neill did have such authority in Local 377, but assert that the evidence absolves him from any responsibility for calling or authorizing the strike and indicates, on the contrary, that he sought from the beginning to induce the strikers to end it. The issue thus raised was considered by the district court which found as a fact that O'Neill did not call the strike and that, in fact, he cautioned against it. The evidence on this issue was sharply conflicting and involved questions of credibility which were peculiarly for the trial judge to resolve. We have carefully considered that evidence. It would serve no useful purpose to review it in detail. We need merely say that we find ourselves unable to characterize the findings of the district court on this issue as clearly erroneous. The finding that Local 377 did not authorize or call the strike must, accordingly, be affirmed.

The district court held that necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization. With this conclusion we agree. As the district court pointed out, collective bargaining agreements such as these impose a continuing day-to-day obligation on the parties to fulfill their terms in good faith. *Curtiss-Wright Corp., Wright Aero. Div. v. NLRB*, 3d Cir. 1965, 347 F.2d 61, 68; *see Conley v. Gibson*, 1957, 355 U.S. 41, 46. This is certainly true with respect to the obligation that there should be no strike pending the use of grievance procedure. Accordingly, in the case of an unauthorized strike against their employer by all the members of a union who are employed by that employer, their union may not disclaim responsibility for the losses suffered by the employer as the result of the strike unless and until it has exhausted all reasonable means within its power to bring that unlawful action to an end. A no-strike agreement would be illusory indeed were a union to be permitted to avoid all responsibility under it for the duration of a prolonged strike which was being carried on by the concerted action of all its members employed in the struck operation, merely because the strike was not initially authorized or called by the union as an organization or by those of its officers who were specially empowered to do so. Rather than to construe a contract as producing such a result, the courts will favor a construction making the mutual promises binding and giving the contract legal effect. 1A *Corbin on Contracts* 8-9; 3 *Corbin on Contracts* 168-171; 17 Am. Jur. 2d 452.

In *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3d Cir. 1974, 497 F.2d 888, 891, this court held that by giving a no-strike pledge substantially similar to those here involved the union had committed itself to use its best efforts to end a work stoppage as soon as practicable. In that case we held that it had done so and thereby had discharged its no-strike obligation.

United Construction Workers v. Haislip Baking Co., 4 Cir., 223 F.2d 872, *cert. denied*, 1955, 350 U.S. 847, is urged by the defendants as authority to the contrary. But in that case the collective bargaining agreement did not contain an express no-strike clause and while the court there held that a strike which was begun without following the grievance procedure was necessarily a breach of the agreement for the settlement of grievances by such procedure, it concluded that there was nothing in the contract making the defendant union liable for such an unauthorized strike by its members or requiring that it take any action with regard to it. We do not read the *Haislip* case as authority for the defendants' position here.

It is true, of course, that the courts may not remake the parties' contracts and may declare an implied obligation to exist only when there is a satisfactory basis in the express provisions of the agreements which make it necessary to imply certain duties and obligations in order to effectuate the purposes of the parties. *Kellogg Co. v. NLRB*, 6 Cir., 457 F.2d 519, *cert. denied*, 1972, 409 U.S. 850. To find such an implied obligation in a labor contract is not without precedent, however. Indeed the *Haislip* case, on which the defendants rely, is an example. And the Supreme Court has similarly held, in a case where arbitration was the means chosen by the parties in their contract to settle a labor-management dispute, that an agreement not to strike pending arbitration was necessarily implied and that the union involved which was engaging in a strike during the pendency of the arbitration proceedings was bound by and had breached that implied agreement. *Teamsters Union v. Lucas Flour Co.*, 1962, 369 U.S. 95. The decision was grounded on traditional contract law and "Even more in point", said the Court, on the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." 369 U.S. at p. 105. And see *Amalgamated Meat Cutters & Butcher Workmen of America, Local 195 v. Cross Brothers Meat Packers*, 3 Cir. 1975 F.2d .

The no-strike clauses in the collective bargaining agreements here involved are basic to the agreements. As stated in the Senate report recommending passage of the Labor Management Relations Act, "the chief advantage which an employer can reasonably expect from a collective agreement is assurance of uninterrupted operation during the term of the agreement." S. Rep. No. 105, 80th Cong., 1st Sess. (1947) p. 16. Moreover, the no-strike clauses were binding on the individual union members on whose behalf the unions signed the agreement,[5] as well as on the unions as organizations and on their officers. *NLRB v. Allis-Chalmers Mfg. Co.*, 1967, 388 U.S. 175, 180. It is perfectly clear that the parties, both the unions and their members as well as the employers, intended that during the term of the agreements there should be no strikes or work stoppages pending exhaustion of the grievance procedure.

The unions point to two provisions of the agreements which they contend limit their liability for unauthorized strikes. The first of these is Article 4 of the National Master Freight Agreement which is applicable to both Locals 377 and 249, as well as to the Teamsters International Union, and which contains the following pertinent provisions:

> "Article 4. Stewards
>
> . . .
>
> "Job Stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Local Union. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the

5. Although such an agreement is binding on the individual union members, the employer has no action for damages against them individually for their breach of the agreement where the union has been adjudged liable for the damages from the breach. *Atkinson v. Sinclair Refining Co.*, 1962, 370 U.S. 238, 249. Further, it has been held that the employer is in any event without a remedy for damages for breach of contract against individual union members who have engaged in a wildcat strike. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 7 Cir. 1971, 452 F.2d 49.

> Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown or work stoppage in violation of this Agreement."

The unions urge that this section of the agreement absolves the unions from any liability for unauthorized strike action. We are satisfied from the context, however, that the phrase at the end of the second sentence "any unauthorized acts" for which the employer may not hold the union responsible refers only to such acts by job stewards and their alternates and does not refer to unauthorized strike activities by other members of the local union.

The other provision limiting union liability for unauthorized strike action appears in Article 43, Section 2, of each of the two supplemental agreements which bind only Local 377 and the Teamsters International Union. That section provides in pertinent part:

> "Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. . . . It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members.
>
> "While the Union shall undertake every reasonable means to induce such employees to return to their

jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. . . ."

While the limitation of union liability for "any activities" contained in the first sentence of this section of these supplemental agreements will be seen to be limited by the context to activities "in calling or instituting strikes or any stoppages of work," the reference in the next-quoted sentence to "such unauthorized acts of its members" does refer to all acts involved in an unauthorized strike, slow-down, walk-out, or any other unauthorized cessation of work in violation of the agreement.

By these restrictions upon the liability of the unions the employers were undoubtedly bound. But they involved only liability for the unauthorized strike action of job stewards and individual union members. They did not relate to or purport to relieve the unions from their own specific promise "that there shall be no strike . . . without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." This promise was binding on the unions as such, as well as on the union members, and it did not necessarily involve assumption by the unions of responsibility for unauthor-

ized strike action of the individual members. While it was not a "no fault" guarantee against any work stoppage, *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3 Cir. 1974, 497 F.2d 888, 890, it did involve the obligation of the unions, which was necessarily implied in their promise, not only not to call a strike themselves but also to take timely steps to end such an unauthorized strike by employing any and all such reasonable means at their command as might be needed to get their members back to work. It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part.

Moreover, it will be observed that the existence of this implied obligation on the part of the unions was recognized in the supplemental agreements to which Local 377 and the Teamsters International Union were parties from which we have quoted above. The second paragraph of section 2 of article 43 of those agreements opens with the following preliminary clause:

> "While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood . . ."

As indicated by the syntactical composition of the parts as well as by the sense, the primary purpose of the second paragraph of section 2 is to confer upon the employer the right to discipline and, after 24 hours, to discharge union employees who participate in a contract-breaking strike. The preliminary subordinate clause introduced by the conjunction "while" and just quoted is in effect a recital of the unions' continuing obligation, which, as we have seen, is implied in their no-strike pledge, to employ all reasonable means to end such a strike. The reference in the clause to an "unauthorized stoppage of

work mentioned above" is a recognition that this obligation exists notwithstanding the unions' release from liability for its members' unauthorized strike activities which is contained in the immediately preceding paragraph. Moreover, the clause functions here as a drafting device to make it clear that the right which the paragraph confers on the employer does not operate to abrogate that union obligation, which is to continue side-by-side with the employer's right. Thus the recital is a recognition of the unions' implied obligation continuously to endeavor to end an unauthorized strike. Since the obligation is one which is implied from the no-strike clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted. And since the no-strike clause appeared in all the supplemental agreements involved in this case it necessarily follows that the unions had a similar obligation under the agreements applicable to each of them, respectively, to use all reasonable means to end a strike existing in violation of that clause, regardless of the presence or absence of a recital of the obligation in the agreements to which a particular union was a party. Thus the obligation of Local 249 and the Teamsters International Union to endeavor to end the strike at Pittsburgh was identical with the obligation of Local 377 and the Teamsters International Union to do so at Warren.

We are satisfied that the continuing responsibility of the unions under the no-strike clause and the recognition of the consequent implied obligation on their part to use all available means to terminate an unlawful strike begun by their members, effectuates the intent of Congress in enacting section 301(a) of the Taft-Hartley Act to promote and make effective agreements not to strike. S. Rep. No. 105, 80th Cong., 1st Sess. (1947) pp. 16-18. Moreover, a construction of the no-strike clause as impliedly obliging

the unions to use their powers to implement it is responsive to the directive of the Supreme Court to the lower federal courts in deciding suits under section 301(a) of the Labor Management Relations Act to fashion a body of federal law in accord with the Congressional intent and with the basic goal of Congress to promote industrial peace. *Textile Workers Union v. Lincoln Mills*, 1957, 353 U.S. 448, 456-457.

We think that there is an additional basis for upholding the finding of union liability in this case. This is the so-called mass action theory. When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members. *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.*, 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 455, *cert. denied*, 1971, 401 U.S. 963; *United Textile Workers of America v. Newberry Mills, Inc.*, W.D. S.C. 1965, 238 F. Supp. 366, 373; *Portland Web Pressmen's Union v. Oregonian Publishing Co.*, D. Or., 188 F. Supp. 859, 866, *aff'd on other grounds*, 9 Cir. 1960, 286 F.2d 4, *cert. denied*, 1961, 366 U.S. 912; *United States v. International Union, U.M.W. of A.*, D.C. D.C. 1948, 77 F. Supp. 563, 566-567, *aff'd on other grounds*, 177 F.2d 29, *cert. denied*, 1949, 338 U.S. 871.

In instances where, as here, in the case of the job stewards and committeemen, union functionaries have instigated, participated in or actively encouraged members to continue their unauthorized work stoppage, the courts have also based union liability for the resulting damage to the employer on the common law of agency, expressly made available to the parties to a breach of contract suit by

§ 301(b) and (c) of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185(b) and (c). *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.*, 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 456; *cert. denied*, 1971, 401 U.S. 963; *Lewis v. Benedict Coal Corp.*, 6 Cir. 1958, 259 F.2d 346, 351-352, *modified on other grounds*, 1960, 361 U.S. 459. See also *General Truck Drivers, C. W. & H., Local No. 5 v. NLRB*, 5 Cir. 1969, 410 F.2d 1347. That a principal may ratify, by subsequent conduct inconsistent with repudiation, an agent's unauthorized acts earlier disaffirmed by the principal may well also be a theory of liability which might be applied under the facts of this case in order to implement federal labor policy and regardless of the contractual limitations upon the authority of the unions' subordinate officials, the stewards and committeemen. See *Restatement 2d of Agency*, § 8A. Moreover, it will be observed that courts upholding liability in these cases, whether upon the mass action theory or agency or on both, have stressed the failure of the unions involved to take steps, other than written and oral exhortation, speedily to terminate illegal strikes as an indication of passive acquiescence in the strike. *Wagner Electric Corp. v. Local 1104, Int. U. of E., R. & M. W.*, 8 Cir. 1974, 496 F.2d 954, 956; *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 457, *cert. denied*, 1971, 401 U.S. 963; *United Textile Workers of America v. Newberry Mills, Inc.*, W.D. S.C. 1965, 238 F. Supp. 366, 372.

In the present case the district court, having concluded that the unions were obligated to use all reasonable means to terminate the strikes, found that they had not fulfilled their obligation in this regard. We cannot hold this finding to be erroneous. The record clearly establishes that the sole means employed by the unions to endeavor to end the strikes was the use of the spoken and written word in the form of declarations of the illegality of the strikes, instructions to return to work and persuasion and cajolery to that

end, all of which the striking union members rejected out of hand. It is clear, however, as the district court found, that in the ugly and violent situation which existed at Warren and Pittsburgh mere rhetoric was not enough. No stronger measures from the unions' arsenal were ever employed, however, although they were available. Thus no effort was made to discipline or remove the job stewards and committeemen who were organizing and leading the strikes,[6] to suspend or fine the striking union members, to place the local unions in temporary trusteeship, or even, until the very end of the strike, to take the votes of union members by secret ballot. Stronger measures, such as these, were indicated, were available and should have been taken to the extent necessary.

The unions rely on a statement by the district court that "Whether or not any of the untaken tacks or unsummoned measures would have produced the cessation of the strike is unknowable." Of course no human reactions can be known with certainty before they occur. But whether the use of the stronger measures which were available would actually have been successful in ending the strikes is beside the point. It was highly probable that they would have been since the use of only one of them in an earlier strike by a Teamsters local against Eazor had been sufficient to end it. The point here is that the unions were contractually obliged to carry out their agreement that there should be no strike by employing *all* reasonable means available to them to seek to end the existing unauthorized strikes and this they failed to do. Having thus chosen not to try out those stronger measures which were available, indicated, and probable of success they cannot be heard to say that such measures, if employed, would not have been successful in

6. That such discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania in April 1968 where the strike was ended when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line.

ending the strikes in this case and that, accordingly, it was not necessary to try them in order to absolve the unions of responsibility for the results of the strikes.

We conclude that the district court did not err in holding that Locals 377 and 249, as well as the Teamsters International Union, each had an obligation to use all reasonable means to end the strikes in which their members were involved, and that they all failed to fulfill this obligation and thereby became liable because of their own breach of contract for the damages resulting from the strikes which they made no adequate effort to end. It is not contended that Local 249 had any responsibility to seek to end the strike against Daniels at Warren. Eazor does contend, however, that Local 377 was obligated to seek to terminate the strike at Pittsburgh as well as that at Warren since the Pittsburgh strike was triggered by Local 377 members who came to Pittsburgh and established the picket line there. We cannot accept this proposition. The strikers at Pittsburgh were, of course, not members of Local 377 and it is, therefore, clear that Local 377 was not in a position to take effective measures to get them back to work, such as it could and should have employed with respect to its own members at Warren. Nor did Local 377's no-strike pledge run to Eazor or its operations at Pittsburgh. It might, perhaps, be contended that, although the strike at Pittsburgh actually involved local grievances there, it was triggered by the strike of Local 377 members at Warren, and that it was, therefore, foreseeable that strike action at Warren might cause losses to Eazor at Pittsburg as well as to Daniels at Warren. Based on this premise the argument might be made that Local 377, although not contractually obligated to Eazor, became responsible to it for the losses at Pittsburgh on some non-contractual theory. However, since it does not appear that such a theory was presented either to the district court or to us, we do not consider it.

The question remains as to the point in time when the liability of the unions arose. Having found that the unions had not called the strikes, the district court held that they were entitled to a reasonable period of time after the inception of the strikes in which to take the action required of them. The district court fixed this period of time as the first 48 hours after the commencement of the strike at Warren. The strike at Warren began at approximately 3:30 p.m. on August 20th. The Pittsburgh strike began on the morning of August 21st. The district court decided that the liability of all the unions arose simultaneously two days after the commencement of the strike at Warren. This decision was based on its finding that all the unions knew of the strikes by the morning of August 21. Having made similar contemporaneous verbal efforts to persuade the men to return to work, which proved wholly ineffective, they all knew within that period of time that stronger measures were required and they should have employed them at once. Technically, the court granted Local 377 a period of grace somewhat less than 48 hours and longer than that awarded to Local 249. This was permissible under the facts and circumstances test which the court decided should govern the extent of the period and which it applied in this instance. The parties do not seriously contest the reasonableness of this period of time, given the facts and circumstances of the strikes and the determination of the district court with respect thereto. We agree with the district court's determination in this regard which we think was a reasonable one.

We conclude that the Teamsters International Union and Local 377 became liable to Daniels for the damages proximately caused by their failure under their no-strike pledge to use all reasonable means to end the unauthorized strike at Warren, and that the liability arose 48 hours after the inception of the strike and continued until it ended with the closing of the Warren terminal. Likewise, we conclude that the Teamsters International Union and Local 249 be-

came liable to Eazor for the damages proximately caused by their failure under their no-strike pledge to use all reasonable means to end the unauthorized strike at Pittsburgh, and that the liability arose 48 hours after the inception of the strike at Warren and continued until it ended when the striking employees returned to work. Eazor urged in the district court that the Teamsters International Union and Local 377 were also liable to it with respect to the strike at Warren, basing this contention on the ground that it was the equitable owner of Daniels under the stock purchase agreement and was actually operating the Daniels business as part of its own at the time of the strike. The district court rejected this contention. On appeal Eazor does not seriously press it since as the result of the later actual merger of Daniels into Eazor a judgment now awarded to Daniels will inure to the benefit of Eazor in any event. It is, accordingly, unnecessary to consider this contention further and for the purposes of this case we have regarded Daniels as the employer at Warren and Eazor the employer at Pittsburgh.

Having considered and affirmed the district court's determination of liability we pass to the question of damages. On this question both plaintiffs and defendants assert error on the part of the district court. The plaintiff employers urge that the court unduly restricted them in their proof of damages and in the elements of damage recoverable and that it erred in holding that they failed to mitigate their damages. The defendant unions, on the other hand, argue that the plaintiffs failed to prove that they were damaged by the defendants' breach and that in any event the damages awarded by the court were excessive. Before discussing these contentions, however, we must consider the measure of damages to be applied in the facts of this case.

As we have already indicated, the liability which the unions incurred was for the damages proximately caused by the breach of their contractual obligation to use every

reasonable means to end the strikes. This breach took place at the expiration of two days after the commencement of the strike at Warren, when, as the district court found, it appeared that sufficient time had elapsed for the unions to take reasonable measures to end the strikes but they had failed to employ any measures more potent than mere rhetoric. We think that the measure of damages recoverable in this case is the actual loss sustained by each plaintiff as a direct result of the breach and which may reasonably be supposed to have been in the contemplation of the parties as the probable result of such a breach at the time the agreement was made. This is the traditional criterion for the ascertainment of damages for breach of contract which the district court rightly held was to be employed here. 11 *Williston on Contracts,* 3d Ed. Jaeger 1968, p. 323. The defendant unions argue that the measure of damages should not be the loss caused by the continued strikes but rather the loss caused by the failure of the unions to employ all reasonable measures within their power to end them. We agree, however, with the district court that in the circumstances of this case the two were identical in extent.

The unions' no-strike pledge was not an aleatory promise conditional upon the happening of a fortuitous event in the future. It was rather an undertaking that there should be no strike by union members during the term of the agreement in violation of the no-strike pledge. Such a strike, which would necessarily have to be carried on by union members, could hardly be described as a fortuitous event. Rather it would necessarily be an event generated within the unions' own constituency, whether with or without the approval of the union organizations, a situation with which the unions were obviously competent to deal as they had agreed to do. In view of the arsenal of powerful measures available to them it is highly probable that the unions could have ended the strikes promptly, given the will to do so. We think that the plaintiffs were entitled to rely upon the unions' doing so, this being the only way

in which, in the case of unauthorized strikes such as these, they could perform their no-strike promise. To hold otherwise would make a hollow mockery of the unions' no-strike pledge and would leave the plaintiffs without any remedy in damages if, as it has been held, the individual union members are not answerable in damages for illegal strike activity. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 7 Cir. 1971, 452 F.2d 49.

If the unions had made a showing of the use of strong and punitive measures without result it would have been for the district court to determine whether they had relieved themselves from liability by fulfilling their obligation to exhaust all reasonable measures available to them to end the strikes. In determining whether available measures were reasonable the sole test would be whether they were within the power of the unions to employ and might be likely to be effective to end the strikes. Any possible negative effect upon the unions themselves and their internal organization, although much stressed by the defendants here, would not have been relevant. For it was the restoration of industrial peace with the plaintiffs, not their own well being, which the defendant unions were obligated by their no-strike pledges to seek. Here, as we have seen, the record fully supports the court's finding that the unions used only rhetoric and wholly abstained from the use of any more powerful measures, thus, in practical effect, acquiescing in the strike situation. Under these circumstances we are clear that they cannot now be heard to urge that the measures to which they did not resort would not have proved successful. It was the possibility of loss from a continuing strike, and not of some theoretical aleatory loss, which must reasonably be supposed to have been in the contemplation of the parties to these collective bargaining agreements. Moreover, the defendant unions were answerable in damages for the loss where, as here, their breach was a substantial factor in causing the plaintiffs' injury, *Krauss v. Greenbarg*, 3d Cir., 137 F.2d 569, 572, *cert. denied*, 1943,

320 U.S. 791, even though the acts of others were contributing factors also, as, for example, the actions of the strikers in this case. *Southern National Bank v. Crateo, Inc.*, 5 Cir. 1972, 458 F.2d 688, 697; *Krauss v. Greenbarg*, 3d Cir., 137 F.2d 569, 572. We conclude that the measure of damages in this case is the loss sustained by each plaintiff as the result of the continuance of the strikes after the first two days of the strike at Warren.

There was a great deal of evidence offered on the subject of the amount of the plaintiffs' losses resulting from the strikes. The evidence included the plaintiffs' accounting records, testimony by accountants with respect thereto, the plaintiffs' corporate reports and much other material. Differing accounting theories for establishing the losses were presented by the accountants who testified and the evidence was in many respects sharply conflicting. We will not here atttempt to outline the conflicting figures and theories with respect to them which the record presents, since it would serve no useful purpose to do so. The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. We need note here only that the defendant Local 377 urges that the plaintiffs failed to sustain their burden of proof by the evidence which they presented of the consolidated losses of Daniels, Eazor and Mahoning Equipment Company, an affiliate which owned and furnished much of the equipment used by Daniels and Eazor. Local 377 contends that Mahoning's figures should not have been included. We think, however, that in the circumstances of this case these figures were relevant. All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous. We, ac-

cordingly, adopt that figure as the district court did, as a starting point for the discussion of the damages.

The plaintiffs urge that the district court erred in failing to include in its determination of their losses attributable to the strike the profits which they alleged they lost both during and after the strike. The court agreed that the plaintiffs would have been entitled to have had such lost profits included if they had proved that such profits would have been earned absent the strike. The court found from the evidence, however, that such profits would not have been earned.

The plaintiffs claimed $80,719.00 in lost profits during August and September of 1968, the strike period, and $1,295,907.00 for profits lost following the strike in 1968, 1969 and 1970 as evidenced by a reduction in its volume of freight. Lost profits resulting from a breach of contract must be proved with reasonable certainty both as to fact and amount. *McBrayer v. Teckla, Inc.*, 5 Cir. 1974, 496 F.2d 122, 126; *McCormick on Damages*, 1935, p. 99. Ordinarily, evidence of sales before and after a breach of contract is acceptable proof showing the amount of revenue and net profits lost by the plaintiff as a result of the breach. *McBrayer v. Teckla, Inc.*, 496 F.2d 122, 127; *Flexitized, Inc. v. National Flexitized Corp.*, 2 Cir. 1964, 335 F.2d 774, 779, *cert. denied*, 1965, 380 U.S. 913. However, Eazor's and Daniels' income picture during the years 1966 to 1970 does not indicate any consistent earning power or any upward trend in profits. Eazor's earnings in 1966 and 1967 had fallen below its earnings of previous years. The integration of the operations of Daniels with those of Eazor in late 1967 may have caused the increased profits both plaintiffs experienced in the first two quarters of 1968. Whether this indicated a trend or was merely a temporary outcome of the new corporate arrangement is problematical. Eazor experienced a loss in July of 1968. The occurrence of the illegal strike in the last two months of the third quarter of 1968 no doubt accounted for the

large deficit Eazor sustained in that period. Eazor's comparative income statement for the last five months of 1968 shows a recoupment of revenue and profits in October of 1968. In 1969 Eazor's revenue and net earnings decreased and it operated with a deficit throughout 1969 and 1970.

The plaintiffs urge that the district court erroneously required them to produce "conclusive proof" of their claimed loss of profits during the period of the strike. It is sufficient as to this to say that we do not read the court's opinion as so holding. The court's use of the phrase "conclusive proof" referred to the necessity for the plaintiffs to demonstrate with reasonable certainty that they would have made a profit during the relevant period as well as the amount of it. This, the court said, and we agree, they had failed to do. We think that the phrase was intended merely to indicate that the plaintiffs were required to meet the standard of proof laid down in *McBrayer v. Teckla, Inc.*, 5 Cir. 1974, 496 F.2d 122, 126, cited above.

The claim for lost profits in the period following the strike was based largely on the contention that these would have been earned on business which the plaintiffs lost as the result of the strike. But here again the evidence was sharply conflicting. Indeed an Eazor annual report to stockholders which was in evidence stated that after the strike the company's operations quickly returned to normal "and we have regained all of our customers." We are satisfied from our examination of the record that the findings of the district court with respect to alleged lost profits are not clearly erroneous and must be sustained.

The defendants contended and the district court held that it was the duty of the plaintiffs to mitigate the damages resulting from the defendants' default by taking steps calculated to end the strike and by refraining from taking any action which would aggravate the situation and increase the damages. The court held that the plaintiffs had failed to comport themselves in accordance with the

legal standard applicable but had instead adhered to a hard-line course of retribution and obstinacy. It has been held that a plaintiff in a section 303 suit has the duty to minimize damages if it is reasonably possible to do so. *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 458. We think, however, that in the present case the plaintiffs did all that could reasonably be required of them to end the strike and thereby to mitigate the damages and that the district court clearly erred in deciding to the contrary.

In the case of *In re Kellett Aircraft Corp.*, 3 Cir. 1950, 186 F.2d 197, this court, considering and rejecting a claim that the buyer should have mitigated the damages in a claim for the breach of a contract for the fabrication of shower cabinets, said:

> "Whether or not the buyer's obligation to mitigate damages has been discharged depends on the reasonableness of its conduct. In this connection, reasonable conduct is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than the other was chosen. The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interests of the defaulter to his own probable detriment." 186 F.2d at pp. 198-199.

We think that the doctrine of mitigation of damages has a limited application to situations in which a union or its members have breached a no-strike agreement by carry-

ing on a strike in violation of the agreement.[7] The limitations which we suggested and applied in the *Kellett Aircraft* case upon the duty of the injured party to mitigate damages apply with even greater force to such a situation. The breach of contract involved in such a strike is quite different in purpose and effect from the breach of an ordinary commercial contract. For its purpose ordinarily, as in the case before us, is to extort by the economic pressure of the loss resulting from a work stoppage, a tactic of economic warfare, benefits from the employer which were denied to the union and its members by the collective bargaining agreement to which they have solemnly assented. Thus it is economic injury to the employer which the strikers contemplate as the means for securing the ends they seek. Under these circumstances the employer may hardly be required to mitigate the damages resulting from that injury by taking steps which amount to a capitulation to the demands of the strikers for benefits which the agreement has denied them. Nor, in our opinion, may the employer be required, upon the theory of mitigation, to take steps which he may reasonably regard as likely to have the effect of encouraging the strikers to repeat such contract-breaking breaches of industrial peace in the future. The unions cannot have it both ways; they cannot sit by without taking appropriate action while a mass of their members wrongfully imposes economic loss on an employer through an unlawful strike in order to secure benefits not granted by their labor agreement and then claim, when called upon to compensate the employer for the resulting loss, that he should have minimized it by acceding to the strikers' demands and thereby ending the work stoppage. Compare *Vulcan Materials Co. v. United Steelworkers of America*, 5 Cir. 1970, 430 F.2d 446, 458.

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7. While the ordinary rules of contract law apply to collective bargaining agreements, their application is necessarily limited in some respects. *NLRB v. C & C Plywood Corp.*, 1967, 385 U.S. 421, 430; *Transportation-Communication Employees Union v. Union Pacific R.R.*, 1966, 385 U.S. 157, 160-161.

It is to prevent just such an interruption of industrial peace between labor and management as took place in the present case that a no-strike clause binding on the union and its members is included in a collective bargaining agreement. As we have seen in the case before us such a clause not only commits the union not to call a strike itself, but also, if its members carry on an unauthorized strike, to assure the continuance of industrial peace by taking such steps as are within its power to get them back to work. To the same end, in such an agreement the employer may be given the right, as was done by the agreements in this case, to endeavor to terminate an unauthorized strike itself by discharging, without regard to existing grievance procedure, union employees who were engaging in such an illegal strike. Other than recourse to the injunctive processes of the courts this appears in fact to have been the only weapon which the plaintiffs in this case had available to them to use to end the strike. Barring its use or the intervention of the courts their only alternatives appear to have been persuasion by the written and spoken word, which proved wholly ineffective, sitting out the strike with its consequent further economic loss, or capitulation to some or all of the illegal demands of the striking employees.

In the present case the district court made the finding that Daniels,[8] which had discharged the employees who were the leaders of the strike at Warren, refused to agree to an offer made by union representatives on September 3d to settle the strike by having all the strikers, including the strike leaders who had been discharged for their illegal strike activity, return to work and submit to the grievance procedure the question whether the latter had been properly discharged. The court pointed out that on September 9th Eazor discharged five strike leaders at Pittsburgh, the stewards and committeemen of Local 249, and on the same

8. The court in this finding used the name "Eazor" in referring to the Daniels operation since Eazor was then operating Daniels. We use the name "Daniels" when referring to the Daniels operation by Eazor.

day "proposed that all remaining employees, not including those it proposed to put on a three-month suspension, return to work with the same condition attached—that the status of discharged employees was final and not subject to arbitration" under the grievance procedure. The court made the finding that Daniels and Eazor failed to mitigate damages on September 9th on which date, the court said, Daniels had refused the unions' settlement offer of September 3d.

We think, however, that the defaulting unions cannot be heard to urge that Daniels and Eazor, the injured parties, should have given up their right to maintain the outright discharge of the strike leaders, and have taken them back pending the outcome of grievance procedure, in an effort to settle the strikes, instead of insisting on their discharge as they had a contractual and legal right to do. *Labor Board v. Sands Manufacturing Co.*, 1939, 306 U.S. 332, 344. It was certainly not unreasonable for the plaintiffs to elect to insist on employing this, their most potent measure, to end the strike, particularly in view of the record of previous wildcat strikes by members of Locals 377 against Daniels and 249 against Eazor which the evidence in this case discloses. For the alternative was virtually to capitulate to the strikers' demands by taking back all the striking employees whom they had lawfully discharged which, under the agreement, they were not contractually bound to do. The latter course might well have ended the strike in a way which Eazor was reasonably entitled to believe, as its president testified, would only lead to similar unlawful action by its union employees in the future.

As the district court said, these parties were engaged in a hard-nosed business. The strikers' conduct was certainly hard-nosed for not only was it in the teeth of their no-strike pledge but it was characterized by widespread violence and intimidation. We repeat that we do not think that under these circumstances the contract breakers, the unions and their striking members, can be heard to complain

that Daniels and Eazor chose to exercise and maintain the right which these very unions had given them to seek to end the strikes by discharging and refusing to reinstate the strike leaders, rather than the possible alternatives which the plaintiffs could have regarded as virtual capitulation to the unlawful demands of the wildcat strikers. As we pointed out in the *Kellett Aircraft* case, the fact that the latter course would have been more advantageous to the strikers is not the test. As we there said: "One is not obligated to exalt the interests of the defaulter to his own probable detriment." We conclude, therefore, that the district court imposed too strict a mitigation standard upon the plaintiffs.

Our examination of the record satisfies us, moreover, that the district court erred in its finding, upon which the court's conclusion of failure to mitigate was largely predicated, that the proposal made by the union representatives on September 3d was rejected by Daniels on September 9th and that on the latter date Daniels proposed that all remaining employees not including those it proposed to put on a three-month suspension, return to work upon the condition that the status of discharged employees was final. As we read the evidence it clearly establishes that the meeting which was held on September 3d in the courtroom of District Judge Lambros in Cleveland was attended by the parties to the suit then pending before him in which an injunction was being sought,[9] their attorneys and other interested persons. The representatives of the unions who were present offered to secure the return of the striking employees if Daniels would reemploy all of them, the ultimate status of Roper and Eckley, who started the strike, to be submitted to the grievance procedure. Prior to this time Daniels had discharged four stewards and committeemen who were considered to be strike leaders and 26 other employees at Warren, all members of Local 377. Daniels

9. This was the suit begun in the Court of Common Pleas of Trumbull County, Ohio which is one of the two suits now before us on these appeals.

refused the offer at the same meeting, however, not on September 9th as the district court found, insisting that all remaining employees must return to work before it would negotiate the status of those who had been discharged. Moreover, there was no evidence that this proposal by the union officers had been submitted to or would have been approved by the body of Local 377 members employed by Daniels.

Shortly thereafter Daniels made a counterproposal which was presented to the striking Local 377 Daniels employees at a meeting attended by most of them in the union hall in Youngstown on September 9th. It appears that this proposal was that all of the strikers would be returned to work without penalty except for the stewards and committeemen, whose discharges would stand, and five or six others who were to have to take a suspension. The grievances of Roper and Eckley were to be processed through the grievance procedure. This proposal, which appears to be a reasonable compromise between the unions' position indicated by its September 3d offer and Daniels' own position on September 3d, was presented to the striking employees at the meeting by O'Neill and the attorney for the striking Local 377 members both of whom recommended that it be accepted but the strikers voted unanimously to refuse it.

Up to September 9th none of the striking members of Local 249 at Pittsburgh had been discharged. However, on that day Eazor discharged the road steward, the road committeeman and another member of Local 249 at Pittsburgh. Daniels and Eazor on the same day, as we have pointed out earlier in the opinion, sent letters to all striking Local 377 and 249 members, respectively, other than Roper, Eckley, the stewards and the committeemen, offering them the opportunity to return to work without penalty if they returned on September 11th and with a penalty if they returned on the 16th. This offer, which we believe also was a reasonable effort on the plaintiffs' part to end the strike, was rejected, however, and on September 17th

Daniels sent letters of discharge to the remaining 157 striking employees at Warren, and closed that terminal permanently, thus ending the strike there. The strike continued at Pittsburgh, however, until following an affirmative vote by secret ballot on September 24th the striking members of Local 249 voted to return to work the next day and ended the strike there. By the counterproposal submitted by Daniels to the members of Local 377 on September 9th and the letter which Eazor sent to the members of both locals on the same day Daniels and Eazor offered to take back all their striking employees, including the 26 who had been previously discharged at Warren, except the stewards and committeemen, who had led the strikes. These strike leaders Daniels and Eazor had, as we have seen, a clear legal and contractual right to discharge without recourse to grievance procedure. As we have indicated, the duty to mitigate damages did not require them to give up this basic right. To hold otherwise would divest the right of any meaning. We conclude that by the counterproposal of September 9th and the offer contained in the letter of the same date, both of which the strikers rejected, Daniels and Eazor satisfied any obligation which rested on them to take action to mitigate their damages. The determination of the district court that they failed in their duty to mitigate their damages accordingly cannot be sustained. It was, accordingly, error for the court to reduce on this account the damages awarded to them.

Included in the figure of $1,079,332.00 representing the plaintiffs' loss was an item of $52,108.00 expended for fees and expenses of counsel which the district court disallowed and deducted from the loss allowed. The plaintiffs urge that this was error, asserting that these fees and expenses were incurred in connection with the work stoppage and were, therefore, properly allowable as an element of their loss. Conceding that legal expenses of that nature would be properly allowable, *Sheet Metal Workers Local 223 v. Atlas Sheet Metal Co.*, 5 Cir. 1967, 384 F.2d 101, 110, the

district court nonetheless held that the plaintiffs had failed to sustain their burden of proving what portion, if any, of these legal expenses were directly related to ending the strikes. In so holding we are convinced that the court erred. On the contrary, our examination of the uncontradicted evidence satisfies us that the plaintiffs did establish that all of this amount but a very small portion, so small in fact as to be fairly treated as *de minimus*, was incurred in connection with the work stoppage. This item must, accordingly, be allowed.

The district court having determined that the aggregate loss proved to have been suffered by the plaintiffs as the result of the strike was $1,079,332.00, a determination which we have accepted, it remains to assign to each of the two actions here consolidated the share properly applicable to it and to determine the portion of that figure attributable to the period for which the defendant unions were responsible.[10]

To apportion the loss between Daniels and Eazor the district court determined that 36.5% of the loss was incurred by Daniels as the result of the strike by Local 377 members and 63.5% by Eazor as the result of the strike by Local 249 members. This apportionment is not seriously challenged on these appeals and we accept it. Applying it to the figure of $1,079,332.00, the aggregate loss of both plaintiffs resulting from the strikes, the loss sustained by Daniels amounted to $393,956.18 and that sustained by Eazor amounted to $685,375.82.

To take into account the fact that the liability of Local 377 and the Teamsters International Union for the loss sustained by Daniels from the strike at Warren did not arise until the third day of that strike, which lasted 29

10. The district court computed the portion of the aggregate loss suffered by the two plaintiffs which was allocable to the first two days of the strike and subtracted that amount from the aggregate loss before determining the portion of that loss which was sustained by each plaintiff. We have reversed this process in order to arrive at an apportionment of the damages which we believe will be more equitable in view of our denial of the defendants' claim for mitigation of the damages.

days in all, we must subtract 2/29 of the Daniels loss from its total loss. Two twenty-ninths of $393,956.18 is $27,-169.39. Subtracting this figure from Daniels' total loss of $393,956.18 leaves a figure of $366,786.79 representing the portion of the loss sustained by Daniels for which Local 377 and the Teamsters International Union are responsible. Taking into account the fact that the liability of Local 249 and the Teamsters International Union for the loss sustained by Eazor from the strike at Pittsburgh did not arise until August 22nd, the third day of the strike at Warren, which was the second day of the strike at Pittsburgh, and that the Pittsburgh strike lasted 35 days in all, we must subtract 1/35 of Eazor's loss from its total loss. One thirty-fifth of $685,375.82 is $19,582.17. Subtracting this figure from Eazor's total loss of $685,375.82 leaves a figure of $665,793.65 representing the portion of the loss sustained by Eazor from the strike for which Local 249 and the Teamsters International Union are responsible.

The district court in entering its judgment awarded prejudgment interest from September 25, 1968, the date on which the work stoppage ended. The defendants strongly object to this award urging that it was improper to allow such interest in a suit for unliquidated damages. The general rule is that when the damages resulting from a breach of contract are ascertainable with mathematical precision prejudgment interest is awardable as of right. If, however, the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add prejudgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation at the time of judgment. *Miller v. Robertson*, 1924, 266 U.S. 243, 258; *United States v. Bethlehem Steel Corp.*, 3 Cir. 1940, 113 F.2d 301, 308, *aff'd*, 1942, 315 U.S. 289; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 3 Cir. 1956, 235 F.2d 224, 231; *Marrazzo v.*

Scranton Nehi Bottling Co., 1970, 438 Pa. 72, 263 A.2d 336; *Restatement of Contracts* § 337; *McCormick on Damages*, 1935, 356. We think that this is an appropriate rule for discretionary application as a matter of federal law in actions brought under section 301 of the Labor Management Relations Act for breaches of labor agreements and that the district court did not err in its discretionary application of the rule in this case.

The judgment entered by the district court in these consolidated cases will be modified by awarding to the plaintiff Daniels against the defendants Teamsters International Union and its Local 377 damages in the sum of $366,786.79 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, and to the plaintiff Eazor against the defendants Teamsters International Union and its Local 249 damages in the sum of $665,793.65 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, in each case with costs. As so modified the judgment will be affirmed. Each appellant shall bear its own costs on appeal.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX E

Judgment of Court of Appeals (July 31, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1759/74-1760

EAZOR EXPRESS, INC., a corporation, *Appellant in No. 74-1759*

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249, *Appellants in No. 74-1760*

(D.C. Civil Action No. 68-1014)

No. 74-1761/74-1762

DANIELS MOTOR FREIGHT, INC., EAZOR EXPRESS, INC., *Appellants in No. 74-1761*

v.

LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellants in No. 74-1762*

(D.C. Civil Action No. 69-1235)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: MARIS, VAN DUSEN and GARTH, *Circuit Judges*

Judgment

These causes came on to be heard on the records from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed June 10, 1974, be, and the same is hereby modified. Plaintiff Daniels is awarded damages in the sum of $366,786.79 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, together with costs, against defendants Teamsters International Union and its Local 377. Plaintiff Eazor is awarded damages in the sum of $655,793.65 plus interest thereon at the rate of 6% per annum from September 25, 1968 to June 10, 1974, the date of judgment, together with costs, against defendants Teamsters International Union and its Local 249. As so modified, the judgment appealed from be, and the same is hereby affirmed. Each appellant shall bear its own costs on appeal.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

July 31, 1975

APPENDIX F

Order of Court of Appeals on Petition for Rehearing (August 29, 1975)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1759, 74-1760, 74-1761 & 74-1762

EAZOR EXPRESS, INC. and DANIELS MOTOR FREIGHT, INC., *Appellants*

v.

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 249; and LOCAL 377 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Cross-Appellants*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and MARIS, VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER and GARTH, *Circuit Judges.*

The petition for rehearing filed by cross-appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ VAN DUSEN
Judge

Dated: Aug. 29, 1975

Supreme Court, U. S.
FILED
1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*, *Petitioners*

v.

EAZOR EXPRESS, INC., *et al.*, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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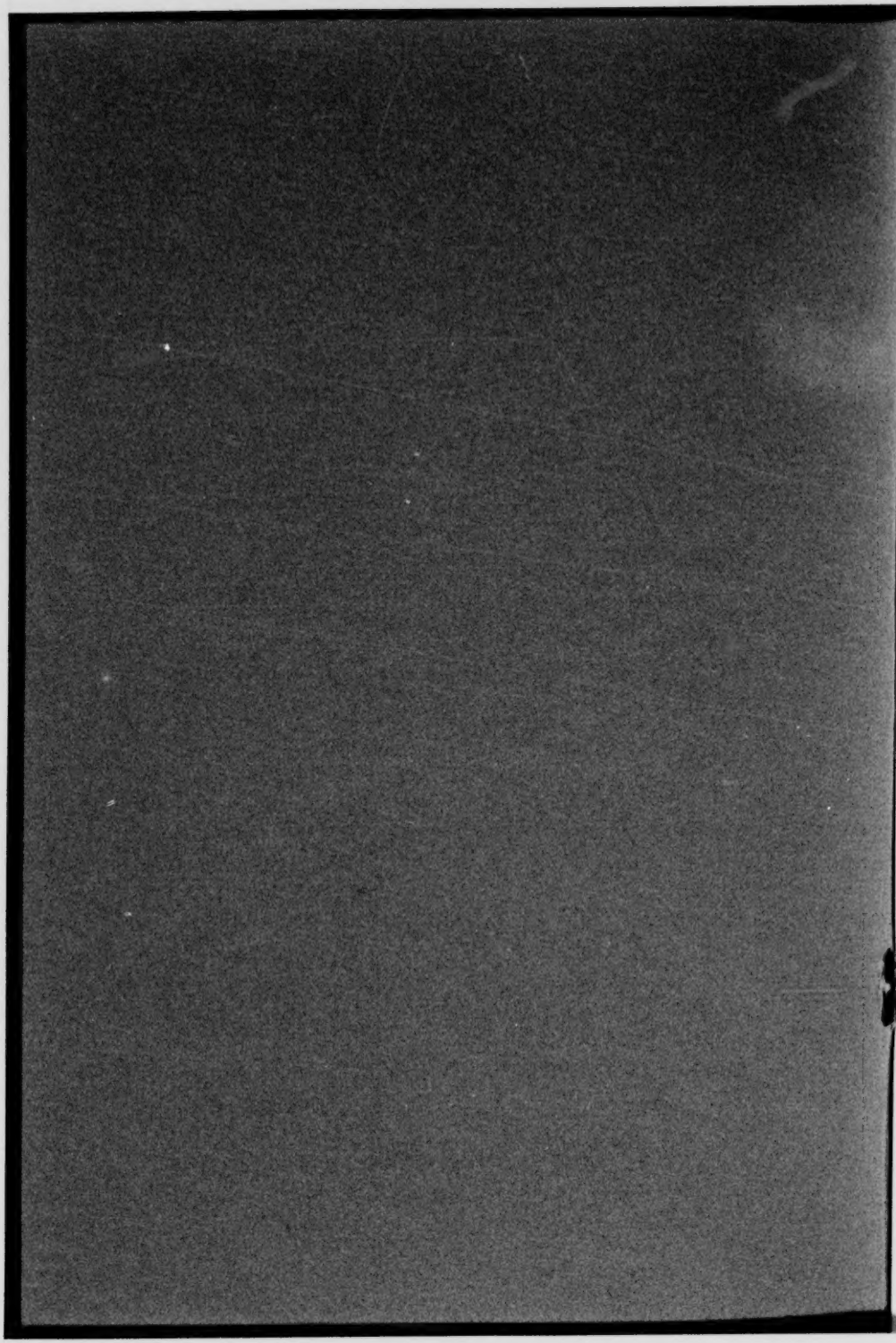


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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-930

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*,
Petitioners

v.

Eazor Express, Inc., *et al.*, *Respondents*

Brief in Opposition to Petition For a Writ of Certiorari

The Petition for Certiorari is characterized throughout with omissions of facts which are highly significant and in many instances crucial to understanding the decisions in the courts below. Some inkling of the extent of those omissions may be gleaned by comparing Petitioners' statement of the Questions Presented with the counter-statement which follows:

QUESTIONS PRESENTED

1. (a) An international union and two of its locals executed a single bargaining agreement with various supplements all of which stated, "*** there shall be no strike without using all possible means of settlement." The International and one of the locals, in certain supplements, attempted to define and limit the circumstances under which they could be held liable for unauthorized strikes by members of that local, and in a manner which was not provided for in companion supplements pertaining to the other local; nevertheless, the International and the first local expressly agreed in the narrower supplement to "*** undertake every reasonable means to induce *** employees to return to their job during any period of any unauthorized stoppage of work." In such a case, did the courts below err in concluding that the collateral obligation with respect to unauthorized strikes, expressly acknowledged to exist in the more narrow supplement, was implicit in the broad primary obligation with respect to strikes set forth in all of the supplements?

(b) May unions be held liable for a strike which the chief executives of the unions allegedly did not authorize, where all of the hundreds of members of the locals involved who were employed by the employers involved participated in the strike, and where the strike was supported by strike votes supervised by the union executives, organized and led throughout by union stewards and committeemen, and where strikers obtained work with other unionized employers through a hiring hall maintained by one of the unions?

(c) In such case, is it error to find that prompt replacement of the stewards and discipline of the strikers by the unions would have terminated the strike promptly, where there is evidence that the previous labor relations record of the employer was excellent; that the strike occurred after two union members were terminated for

deliberately refusing direct work orders and that those members had a right to resolve disputes associated with their terminations by arbitration, and where there were almost no other grievances pending between the employer and union members?

2. (a) The damages awarded consisted of the operating losses which two carriers sustained during a four-week period, and both sides produced experts who testified to the amount of such losses on the basis of the same accounting records. The differences in the conclusions reached were solely the result of differences of opinion as to matters of proper accounting practice in specifically defined areas. The award of the trial court, while for a lump sum, was directly in accord with the detailed Requests for Findings and Brief dealing with all of the issues which were submitted by one of the parties. On appeal, both sides agreed that the court of appeals could review and reach its own conclusions, on the basis of its own review of the evidence and the Requests for Findings and Briefs submitted below by all parties. In such a case, where the court of appeals does, in fact, review the record and affirm the lower court on the basis of that review, should this Court grant a writ of certiorari to require the court of appeals to remand the case to the trial court for specific findings?

(b) Where a trial court, in an action for breach of a labor contract, limits the plaintiffs' award to the plaintiffs' direct operating losses during a four-week strike plus pre-judgment interest, and a court of appeals, after review, expresses the opinion that the award of pre-judgment interest was appropriate, should this Court grant certiorari for the purpose of requiring either the court of appeals or the trial court to explain in detail its reasons for awarding interest?

(c) In such a case, where a court of appeals, after independent review of the record, concludes that the trial

court was correct in computing the amount of plaintiffs' direct loss, but clearly erred in limiting its award to fifty percent of that loss plus pre-judgment interest, must the court of appeals, after holding that the plaintiffs are entitled to their direct losses in full, remand the matter to the trial court, for further consideration of the issue of pre-judgment interest, when the court of appeals determines independently that an award of interest is required "in order to arrive at fair compensation"?

STATEMENT OF THE CASE

INTRODUCTION

This is a case in which a very large motor freight carrier and its affiliate, whose operations were almost entirely disrupted for approximately one month as the result of a Strike, sought to recover damages from the International Brotherhood of Teamsters and two of the many locals with which the employers had executed a national collective bargaining agreement covering the period April 1, 1967, through March 31, 1971. Although the Strike was in direct violation of the parties' contract, it was led throughout by Union stewards and supported by all of the hundreds of members of the International and two Locals at the employers' principal terminals and by the great majority of members of other Teamster Locals who were parties to the same contract and manned other terminals of the employers throughout the system.

The case was tried by a newly-appointed trial judge who, while apparently convinced of the Unions' liability under the facts stipulated to prior to trial, sought nevertheless, throughout the course of the proceedings, to induce settlement, on a liability theory and in an amount which would not unduly trouble the Unions, even though the Unions, from the inception, refused to acknowledge liability or offer one cent.

Plaintiffs contended that, even though the Strike was in direct violation of the Unions' contract, it was in fact authorized and called by a vice-president of one Union Local who, in fact, had authority to call the Strike. However, the trial judge, while conceding that "*** the circumstances and the sequence of events are undeniably suspicious," nevertheless chose to accept the testimony of the Union official involved, to the effect that he had not called the Strike, and found that the Strike was not authorized.

Nevertheless, the judge did impose liability on the basis of the alternative grounds discussed in the Unions'

Petition here, one of which, failure to discipline, had the advantage, not unrecognized by the Unions, of further strengthening the arm of the International in future dealings with its Locals with respect to allegedly unauthorized strikes. Here, the Unions claim that the employers' contention, adopted by the courts below, that the Unions should have taken stronger measures to terminate the Strike, is simply hindsight. This is simply not so. The first of the two lawsuits consolidated in this proceeding was filed on the second day of the Strike, and it included a specific allegation that the Unions were not taking effective actions to terminate the Strike as required by the parties' contract. Also, contrary to another assertion in the Introduction to the Unions' Petition, both the district court and the court of appeals concluded that, if the Unions had taken appropriate action promptly, the Strike would have ended promptly. And there is ample support in the record for that conclusion.

Plaintiffs sought to recover the following damages: (a) 1.1 Million Dollars in direct operating losses which the employers sustained during the Strike; (b) 1.3 Million Dollars in profits lost on diminished general commodities tonnage during an eighteen-month period following the Strike, and (c) hundreds of thousands of dollars in interest which the primary carrier was obliged to pay on loans which the primary carrier was obliged to carry and/or greatly increase as a result of the Strike.

As part of his continued effort to dispose of the case on some basis which the Unions might find satisfactory, the trial judge was very harsh in his treatment of plaintiffs' damage claims even though, in every instance, the fact of damage and the large amounts involved were very well documented. The principal plaintiff had been operating at a profit for thirty-seven consecutive years and both plaintiffs were enjoying a good year up until the day of the Strike; both suffered huge losses during the Strike and lost hundreds of experienced employees as a result of the Strike. Also, the principal plaintiff became highly unprofit-

able after the Strike and continuously sustained a substantial loss in volume. Nevertheless, the trial judge awarded plaintiffs nothing for lost profits during or after the Strike and, in a decision reversed by the court of appeals as without precedent in law or basis in fact, limited his award to fifty percent of direct operating losses during the Strike less legal expense. This was based on findings that the employers failed to mitigate damages by rejecting an alleged Union offer to end the Strike at its midpoint if the employers would permit all but the Strike leaders to return to work without penalty.

Since this was an action for breach of contract, and the direct operating losses which were the basis of the award were subject to calculation, the judge properly included pre-judgment interest in his award.

It was the employers, rather than the Unions, who filed the first appeal from the decision of the trial judge. The court of appeals found some support in all of his findings and conclusions on the liability issues, but reversed his conclusions that the employers had failed to mitigate damages and had failed to establish the amount of the counsel fees which they incurred in their attempts to terminate the Strike. The propriety of neither of these conclusions is challenged by the present Petition.

The trial judge greatly complicated plaintiffs' ability to attack his limited damage award by declining to make very detailed findings on those issues. However, his ultimate finding as to the amount of plaintiffs' operating losses during the Strike was directly consistent with a series of detailed Requests for Findings and Briefs on this subject submitted by plaintiffs' counsel, all of which were annotated to the Record. These documents and the counterparts submitted by the defendants were included in the Record reviewed by the court of appeals, and that court specifically stated, after review, that it found support in the Record for the trial judge's finding as to the amount of plaintiffs' direct loss.

Even as modified by the court of appeals, the award

below, while substantial, compensated plaintiffs only for their direct Strike losses plus interest and was substantially less than forty percent of plaintiffs' actual claim.

Factual Background

A. Eazor, Its Operations, and Its Labor Relations Prior to April 1968

Eazor was founded in 1937 and has its principal place of business in Pittsburgh (J.A. 164). By the summer of 1968, directly and through Daniels, Eazor employed approximately 2500 persons (J.A. 1427) and operated 40 general commodities terminals and 31 special commodities terminals in 15 eastern, midwestern, and southeastern states (J.A. 172-174). Approximately 90 percent of Eazor's revenue and 50 percent of Daniels' revenue derived from general commodities freight (J.A. 3392, 1106a). The hubs of a general commodities motor freight operation are breakbulk commodities terminals. There were two of these in the Eazor-Daniels system, one in Pittsburgh and the other in Warren, Ohio (J.A. 1818-1820). Approximately 300 drivers, dock workers and garage personnel were employed at each of these terminals (J.A. 1820-1821, 1704, 1939-1940, 2296-2297).

B. The Defendant Locals and Plaintiffs' Relations With Them Prior to April 1968

Local No. 249 is the largest Teamster local in Western Pennsylvania and in 1968, its members included all of the drivers and dock workers, but none of the garage employees, at Eazor's Pittsburgh terminal (J.A. 165-166, 1809, 2283). Local No. 249 had a long history of participation in wildcat strikes (J.A. 1392-1393), and such strikes had been extremely damaging to the motor freight industry in the Pittsburgh area. In fact, by 1968, Eazor was the only

national motor freight carrier which still had a terminal in Pittsburgh (J.A. 2294-2295, 371a).

Notwithstanding the problems experienced by other carriers in the area, Eazor had never had a substantial strike other than an industrywide strike prior to April, 1968 (J.A. 2271). The President of Local No. 249 conceded that Thomas Eazor, chief executive of Eazor Express, had a "good operation", "was very close and always had been" and "always worked with his men" (J.A. 2883, 2895).

Local No. 377 maintains headquarters in Youngstown, Ohio (J.A. 166). At all times material, its members included the drivers, dock employees, and garage employees at the Eazor-Daniels terminals in Warren, Ashtabula, and Youngstown, Ohio (J.A. 166, 2506, 2575-2583).

Like Local No. 249, Local No. 377 had a long history of involvement in wildcat strikes (J.A. 3179-3182, 2313); it also had been threatened with the imposition of trusteeship by the defendant International for a variety of other reasons over the years (J.A. 2014-2016).

Daniels was in business for some years prior to its being acquired by Eazor in October, 1967, and its revenues were almost as large as Eazor's at that time (J.A. 3177-3179). While Daniels reported having made money as recently as 1966, it sustained large losses in 1967—because of an industry-wide strike which occurred in the spring of that year and because of an unauthorized steel-haulers' strike which occurred in the summer of 1967 and adversely affected the adjacent general commodities division in Warren (J.A. 3180-3182, 3172-3173, 3392). In fact, according to the uncontradicted testimony of Robert Eazor, Local No. 377's over-the-road steward and committeemen at Warren had repeatedly led the men there in unauthorized strikes (J.A. 2313).

C. The Agreement and the Parties To It

In addition to the statements on this subject in the Petition, the Court should know that a Pretrial Stipulation

of the parties (J.A. 166-167, 169-171) establishes that The National Union Committee of the defendant International, as well as the defendant Locals and many other locals, were parties to the National Master Freight Agreement, and that the National Union Committee of the International in all instances and the Locals in specified ones were parties to area agreements "which were supplemental to the National *** Agreement, covered the same time period," and "*** were the product of contemporaneous negotiations *** conducted on behalf of the unions involved by the National Union Committee and subcommittees appointed by, deriving their authority from, and acting on behalf of the National Union Committee."

Article 2, Section 4, of the Master Agreement provides, in part (J.A. 256):

> "The employees covered under this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. It is understood that the printing of this Master Agreement and the aforesaid Supplements in separate Agreements is for convenience only and is not intended to create separate bargaining units."

The National Agreement and all Supplements were voted on by the membership of all locals covered, acting as a single body, pursuant to the International's Constitution (J.A. 54a-55a).

The National Agreement and all applicable Area Supplements included the following provision (App. 42a):

> "The Unions and the Employers agree that there shall be no strike, lockout, stoppage, tie-up, or legal proceedings without first using all possible means of settlement, as provided for in this Agreement and in the National Agreement if applicable, of any controversy which might arise."

The only contractual remedy of an employer confronted by a strike which violated the foregoing provisions

was the right to discharge participating employees (306a), and the International conceded that, in practice, large scale discharges are impractical, since experienced employees who are terminated can readily obtain employment elsewhere in the industry (J.A. 2971-2972).

In addition, an employer has the right to seek an injunction and to sue for damages.

D. The April 1968 Strike and Its Aftermath

In April, 1968, the Local No. 377 men employed at the Daniels special commodities terminal in Youngstown walked out, claiming pay shortages; the Local No. 377 men at Warren left their work in sympathy, and strikers from both of these terminals established a picket line in front of the Eazor terminal in Pittsburgh which the Local No. 249 members employed there (including the stewards and committeemen) refused to cross (J.A. 176, 180-181, 1078-1079, 1434, 1706-1708, 2510-2511, 3148-3152).

The April, 1968, work stoppage, was a direct violation of the Unions' no-strike pledge. It affected the two break-bulk terminals in the Eazor-Daniels system and resulted in Eazor-Daniels sustaining a net loss of $148,000 that month—and this was the only loss month sustained by the system in 1968 prior to July (64a; J.A. 3198-3200, 3683-3684).

Nevertheless, Eazor imposed no sanction on any participant, on the basis of representations by union officials that, if Eazor refrained from doing so, the International would guarantee that there would be no more unauthorized work stoppages (J.A. 1436-3153).

The procedure established in the parties' Agreement and its Supplements required that all grievances be reduced to writing and processed through the grievance machinery unless they were resolved by discussion between the supervisor of the employee involved and the union steward (J.A. 1437-1439, 1487-1518, 2626). It is undisputed that at the time the strike in suit began there

were no written grievances pending with respect to any Daniels employee at the Warren terminal, and there were only two written grievances pending in Pittsburgh, both of which were being processed in the normal manner and were ultimately resolved in the employer's favor (J.A. 986-987, 181, 1663-1666).

E. The Strike of August 20—September 25, 1968

As the trial court below found (App. 6a), John J. O'Neill, Vice-President and Business Agent for Local 377, was the representative designated by the Ohio Area Supplements as "the Union's authorized representative to * * * (2) make commitments for the '*Union*' generally, and in particular having the sole authority to act for the Union in calling or instituting strikes or any stoppages of work." "Union" in the National Agreement and all Supplements refers to both the Local Unions *and* the National Union Committee (274a), and the trial court and the court of appeals found that this Committee was actually the International (App. 17a-18a, 46a-48a).

It is *not* disputed that the Strike began under the following circumstances: two Local No. 377 members who worked out of the Daniels' terminal in Warren, Ohio, were terminated for refusing to obey direct work orders (J.A. 1000-1005, 1017-1019, 1079-1081), and O'Neill, who sympathized with the men (J.A. 1022-1024, 2524), was involved in an altercation with an Eazor supervisor which took place in the course of a grievance meeting which followed the terminations (J.A. 1019-1022, 1082-1083, 2523-2524). At that time, according to plaintiffs' witness Clark, O'Neill specifically threatened to call a strike (J.A. 1024).

While O'Neill denied specifically threatening a strike, he did admit telling Clark, at the end of this meeting, that Clark was "making a grave mistake" (J.A. 2526). Then, admittedly, O'Neill spent an hour walking around the Terminal, speaking to the men (J.A. 1025-1026, 1085, 2528-2529), and O'Neill left the Terminal after making an un-

complimentary comment about the Company to its terminal manager (J.A. 1085).

Next, O'Neill crossed the street to enter a truck stop where, admittedly, he conversed with various Eazor-Daniels over-the-road drivers and one of their committeemen (J.A. 2530-2532, 2703-2704). Uncontradicted evidence showed that within ten minutes after O'Neill left the Terminal, an out-of-town driver told the dispatcher that the Terminal was "going to go on strike"; the same man returned a short while later to inform the dispatcher that the strike would begin in one half hour; the Strike did begin at Warren at the time predicted; also, it was extended to Youngstown by the Local No. 377 road steward from Warren one half hour later (J.A. 1028, 1029, 1086-1087, 1635-1638, 2299-2300).

The trial court found (App. 7a-8a): "Although the circumstances and the sequence of events are undeniably suspicious, I find, in the absence of evidence to contradict [O'Neill's self-serving statements as corroborated by the testimony of two other Local No. 377 officials] * * * that he did not call the strike, and that, in fact, he cautioned against it."[1]

What the trial court did not state was that plaintiffs' testimony with regard to the strike threat by O'Neill, the report by the employee, and O'Neill's activities was all given on the basis of memoranda made by the witnesses shortly after the events in question, and that two of those

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1. The relationship between O'Neill's actions and the commencement of the Strike is strikingly similar to that which has led other courts to find that other alleged wildcat strikes were in fact authorized by union officials. See *Mason-Rust v. Laborers' International Union, Local* 42, 435 F.2d 939 (8th Cir. 1970); *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 1551 (6th Cir. 1970); *N.L.R.B. v. Truck Drivers & Helpers, Local U. 676, etc.*, 450 F.2d 413, 415 (3d Cir. 1971); *Wagner Electric Co. v. Local 1104*, 361 F. Supp. 647 (E.D. Mo. 1973), *aff'd*, 496 F.2d 954 (8th Cir. 1974); *Celotex Corp. v. United Steelworkers of America*, 388 F. Supp. 1132 (E.D. Pa. 1974).

witnesses were not employed by Eazor at the time they testified (J.A. 1015, 1019, 1632-1635).

Furthermore, while O'Neill denied at the trial that he had done anything to incite the men while walking around the Terminal and after leaving it, little weight should have been accorded such testimony in view of the fact that, when he gave his discovery deposition in May of 1971, O'Neill purported to have no recollection whatever of what he did after the grievance meetings and after leaving the Terminal (J.A. 2647-2649) and insisted that this was so even when he has read some of the Eazor memoranda on the point—to see whether they would refresh his recollection *(id.)*.

Eliser, a local 377 official who gave brief corroborating testimony in support of Mr. O'Neill at the trial (J.A. 2795-2800), was not mentioned as a defense witness in the defendants' Pre-Trial Memoranda, in the Pre-Trial Stipulation or, indeed, at any time until, weeks after the plaintiffs' evidence was concluded, Local No. 377 filed a supplemental list of witnesses (J.A. 2793-2794).

Also relevant in this regard was plaintiffs' evidence that O'Neill and the other officials of Local 377 refused to come to the scene or accept or return any of scores of telephone calls which Eazor made to the Local 377 Union Hall and to O'Neill's home, in an effort to obtain assistance, between 3:30 P.M. on Tuesday, August 20th, and Mr. O'Neill's appearance in court on the morning of Friday, August 23, 1968. Testimony to this effect, corroborated by contemporaneous memoranda, was given by five witnesses (J.A. 1029-1031, 1088-1089; 1450, 2432, 2319-2322). Also, the more important of these witnesses were no longer employed by Eazor at the time they testified (J.A. 1014, 1402).

From Warren, the Strike spread to Pittsburgh, after which Union members from the two terminals set up picket lines throughout the Eazor-Daniels system, and these lines were respected by the members of the Teamster locals employed in many other areas, although they were unlawful

(J.A. 182, 1149-1152, 345-356). As a result, all Eazor-Daniels general commodities freight was embargoed on August 26th, and this embargo continued until September 18th in all areas but Pittsburgh, and until September 25th there (J.A. 188, 201-202, 3224, 1982).

From its inception, the Strike was led, openly and notoriously, by the over-the-road shop stewards and committeemen of the defendant Locals (Proposed Annotated Liability Findings Nos. 236(b) and 271(b). Local No. 249 found employment for many strikers through its hiring hall, and others found employment with Eazor's competitors by calls placed to the strike leaders by Local No. 249 stewards employed by the competitors (J.A. 194; Proposed Annotated Liability Findings Nos. 267-270, J.A. 332-333).

The Petition, echoing the Opinion of the district court (App. 16a), states that the Union members reacted angrily to whatever efforts Union officials did make to persuade them to return to work. This is misleading. The President of Local No. 249 testified that, at the inception of the Strike, his men seemed angrier with the Union than with their employer and most of them wanted to return to work (J.A. 2884-2892). Various rank and file members of Local 377 testified to their desire to work throughout the Strike (J.A. 1077-1078, 1820-1822, 1308, 1315, 1332). However, as the Strike continued, it was characterized by the accelerating pattern of violence and threats of violence described in the Teamsters' Petition.

F. Eazor's Efforts to Obtain Judicial Relief

On August 21, 1968, Eazor and Daniels instituted one of the two cases which are now before this Court, in the Court of Common Pleas of Trumbull County, Ohio. In that suit, the plaintiffs petitioned[2] for an injunction as well

2. The Petition specifically averred (J.A. 21): "Plaintiffs say that by the terms of the collective bargaining agreement, defendant Teamsters and Teamster Local are required to induce employees to return to work at any time there is a work stoppage in violation of the agreement and that defendant Teamsters and Teamsters Local have wholly failed to do so or attempt to do so."

as damages (J.A. 18 *et seq.*). However, all of the defendants, including the International and Local No. 377 as well as various individuals, substantially prevented the suit from having any immediate or substantial effect on the work stoppage by entering an appearance by a single attorney—the regular lawyer for Local No. 377—and jointly removing to the United States District Court in Cleveland (J.A. 28 *et seq.*).

The Federal Court did not enter a restraining order, even as to violence, until September 4th (J.A. 4730-4731) and declined to hear evidence on plaintiff's application for a preliminary injunction until September 12th (J.A. 3088-3089). As a consequence, the defendants were able to prevent the Ohio Court from entering either a restraining order or an injunction against obstructive picketing as well as violence. In Pittsburgh, Eazor filed separate suits. In the first, filed in State Court, Eazor sought only injunctive relief (876a), and appropriate orders were entered promptly and enforced by the Allegheny County Court throughout the Strike. The second Pittsburgh suit, which is now before this Court, was instituted in the District Court for the Western District of Pennsylvania on August 24, 1968 (J.A. 52, *et seq.*); there, Eazor sought only damages.

G. Termination of Strike

On September 17, 1968, after first according all Local No. 377 strikers, other than the initial two grievants and the over-the-road steward and his two committeemen, two opportunities of returning to work without penalty, Eazor permanently closed the Daniels terminal at Warren and discharged all strikers employed there (J.A. 199-201). This action was taken after the Warren strikers rejected the recommendations of their own lawyer (J.A. 2602), and ultimately, their own union officials, that they return to work on this basis and insisted that none of them would return unless all, with the possible exception of the original

dischargees, were accepted back (J.A. 2207-2211, 2221-2225, 2602-2604).

Up to this point, Eazor had discharged no Local No. 249 members other than the road steward, one of his committeemen, and a third strike leader, and even that action had not been taken until September 9th, twenty days after the Strike began (J.A. 193). On September 17th, at a meeting at the International headquarters in Washington, Eazor offered to permit even these leaders to return to work, pending arbitration of grievances which might be filed as the result of their discharge, but the offer was rejected by the Unions (J.A. 2390-2392). At the end of the meeting, the International official chairing the meeting told Thomas Eazor: "Everybody goes back to work or nobody" (J.A. 2392, 2422).

On September 18, 1968, hundreds of strikers made a mass attack on a convoy of Eazor trucks in Pittsburgh (J.A. 199-200, 1973-1974, 2603-2604, 2296-2298, 2394-2395). Eleven Local No. 249 members[3] were arrested, and, following trial, they were convicted and imprisoned for criminal contempt of court by the Court of Common Pleas of Allegheny County (J.A. 200, 1115-1117).

On September 24, 1968, after the Supreme Court of Pennsylvania refused to stay execution of these sentences, Local No. 249 officials permitted its striking members to vote, for the first time by secret ballot, on whether to return (J.A. 202, 1767-1773, 1792). They voted to do so, and the President of the Union and the strike leaders led all of the men back to work on September 25th (J.A. 1222-1224, 1587-1591, 1795, 2895).

The Petition on page 11 quotes squibs from a letter in which Eazor told the strikers that they had "defied the International Union * * * (and) * * * defied the Local Union" (2 J.A. (Exs.) 362a). This letter was written very early in

3. Contrary to a statement in the Petition (page 10), those jailed did not include any of the stewards or committeemen who led the Strike.

the Strike, and its author explained that, at the time, he was relying on telegrams from Union officials repudiating the Strike, but that, as time passed and none of the strikers returned, he came to conclude that the Strike was actually being supported by the Unions (J.A. 2289-2290). The Petition also quotes from a note which an Eazor labor relations representative sent to the General President of the International on September 6th, thanking him "for your help in this endeavor" (4 J.A. (Exs.) 1158a). The "endeavor" referred to in this connection was to have the Unions take action against a Local 249 steward who was interviewed on television about the Strike, spoke in favor of it, and stated, among other things, that the strikers were receiving help from their Union (J.A. 422a). As a matter of fact, this steward was never removed during the Strike by either the International or the Local. The President of Local 249 testified as a witness on his behalf in the post-Strike arbitration proceedings (J.A. 205), and Normal Kegel, a general organizer for the International who was a member of the Grievance Committee which deadlocked on this issue previous to the arbitration, voted against this steward's discharge (4 J.A. Exs. 864a).

H. Pretrial Proceedings

Some of the Reasons assigned in the Petition for the granting of a writ of certiorari pertain to the decision of the court of appeals to modify and affirm the decision of the district court rather than to remand for further findings. To understand this fully, this Court must be familiarized with the extraordinary manner in which this case was handled in the trial court.

This case was assigned to Judge Hubert T. Teitelbaum in January, 1971, very shortly after Judge Teitelbaum's appointment to the bench (J.A. 6, 11).

After taking scores of depositions, plaintiffs' counsel met repeatedly and at length with counsel for the various defendants and eventually secured a 44-page Stipulation

of Undisputed Facts (J.A. 161-225). This documented, among other things, the International's involvement with the National Master Freight Agreement and the uniform failure on the part of all of the defendants to take or threaten to take any action to discipline any of the unauthorized strikers or their leaders (J.A. 166-168, 170-171, 203).

At the final pretrial conference, held April 14, 1972, Judge Teitelbaum announced, for the first time, that he had decided to bifurcate the trial as to liability and damages for the purpose, he said, of encouraging settlement after he had decided the liability issues. He persisted in this ruling even though he was advised by plaintiffs' counsel that there was no possibility of settling the case, and that almost all of the witnesses who would testify as to damages would also testify as to liability (J.A. 958-965).

I. The Trial as to Liability

Throughout the trial, Judge Teitelbaum consistently and repeatedly adopted arbitrary postures consistent with his achievement of the following objectives:

> (a) Limiting the admission of evidence which would justify imposing liability on any of the defendants on a basis which would directly implicate the unions or their top officials in actually authorizing the strike;
>
> (b) Creating or finding some basis which might justify limiting the damages to be awarded if liability were imposed, and
>
> (c) Inducing the parties to settle for a sum which would compensate the plaintiffs only for the direct damages, and perhaps only partially, which they sustained during the strike itself.

The actions of the trial judge, which are the basis of our assertions concerning his fixed points of view, include incidents recorded at the following points during the

presentation of plaintiffs' evidence as to liability: during Gilmer testimony (J.A. 1193-1197, 1200-1205, 1210-1211, 1220-1221); during Malivuk testimony (J.A. 1537-1586); during testimony of Local No. 377 "rank and filers" (J.A. 1286-1290, 1308-1309, 1317-1318, 1325-1326); during Airesman testimony (J.A. 2052-2056); Cf. rulings during O'Neill testimony (J.A. 2521-2522); during McGeough testimony (J.A. 2178-1280).

After plaintiffs rested as to liability, Judge Teitelbaum recessed the trial and gave the defendants, who had conducted no discovery by depositions, five weeks to respond.

When trial resumed on June 27th, the first defense witness was John J. O'Neill. O'Neill had given a deposition prior to trial in which he purported to have no recollection of anything that occurred immediately after a grievance meeting of August 20, 1968, which immediately preceded the Strike (J.A. 2647-2649). In the same deposition, O'Neill freely and expressly conceded that he was the only Local No. 377 officer involved in handling the Strike (J.A. 267, 2678-2679), and that the International had taken no steps whatever to terminate the Strike other than sending a telegram at the Strike's inception (J.A. 2014-2016). This same fact was specifically conceded in the Pretrial Stipulation with respect to undisputed facts (J.A. 194-196).

However, when O'Neill was called as a defense witness at trial, he purported to have a complete recollection of the events which took place immediately after the grievance meeting of August 20, 1968, and during the following days; of his having allegedly warned his members immediately prior to the Strike against striking, and of his allegedly having instructed his stewards against participation in the Strike when they allegedly consulted him on the day the Strike began (J.A. 2528-2536). O'Neill also purported to have a detailed recollection of a series of meetings and conversations during the Strike between himself and William Presser, an International vice president from Cleveland, in which Presser allegedly attempted to persuade the Local No. 377 members to return to work (J.A. 2540-2541, 2551-2558).

Presser had never been identified as a defense witness prior to trial and was never called as a witness.

In the course of O'Neill's direct examination, Judge Teitelbaum asked him a leading question, the obvious purpose of which was to have O'Neill state, as he did, that there was allegedly a time, in early September, 1968, in which the Local No. 377 strikers allegedly would have returned to work had Eazor chosen to limit its sanctions to the original two grievants and the strike leaders, but that Eazor, allegedly, rejected an offer to settle on this basis (J.A. 2560-2561, 2568-2569).

Plaintiffs' counsel commenced a lengthy cross-examination of O'Neill, to establish his general and specific lack of credibility. In the course of the questioning, Judge Teitelbaum accused plaintiffs' counsel of "pursuing the tactics of Don Quixote" (J.A. 2631-2632) and repeatedly suggested that O'Neill, when confronted with contradictions between his testimony at trial and his deposition statements, answer questions by stating "I don't know" or "I don't recall" (J.A. 2644-2645, 2647-2662).

Plaintiffs' counsel concluded his cross-examination on June 27, 1972, by establishing that O'Neill's testimony with respect to the settlement offer allegedly made to and rejected by Eazor in a courtroom in Cleveland, which the Judge had developed in his own questioning of O'Neill, was directly contrary to the following statement by O'Neill in a discovery deposition (J.A. 2668-2669):

> "There was no discussion with me about any settlement. There were meetings with the Judge and the opposing lawyers. I was not party of any discussions of any settlement."

At this point, the court recessed for the day and Judge Teitelbaum summoned all counsel to chambers; he stated that, on the basis of O'Neill's testimony, he felt he could award no damages after the point at which Eazor had allegedly arbitrarily refused to settle. The Judge's expressions seemed unshaken by statements of plaintiffs' counsel to the

effect that O'Neill's testimony on this subject was contrary to his deposition and would be contradicted.

Judge Teitelbaum was taken ill during the night; as a consequence, trial did not resume until August 28th. When the cross-examination of O'Neill resumed, the Judge permitted him to give unresponsive answers to questions which, if answered responsively, would have established that the Local No. 377 strikers had rejected an alleged union proposal for settlement on the basis allegedly submitted to and rejected by Eazor when that proposal allegedly was made to them by International Vice-President Presser earlier the same week (J.A. 2683-2686).

Other cross-examination established that testimony which O'Neill had given on direct examination on June 27th had been based on statements made to him by others, rather than his own knowledge. Plaintiffs' counsel moved to strike the original testimony as hearsay, and Judge Teitelbaum angrily denied the motion on the ground that the motion was "way out of time." When plaintiffs' counsel pressed the point, he was accused of being "fresh with the court." The Judge added that he had allowed plaintiffs' counsel "to put in evidence liberally," and, when plaintiffs' counsel denied that this was so, the Judge held him in contempt and fined him $50 forthwith (J.A. 2691-2692).

Judge Teitelbaum overruled an objection by plaintiffs' counsel and permitted counsel for Local No. 377 to lead another of his witnesses so that his testimony would accord with that of Mr. O'Neill with respect to the efforts which O'Neill testified he had made to persuade this witness not to strike on the day the Strike occurred, after the first answer of this witness was directly inconsistent with O'Neill's testimony; in overruling the objection, the Judge described the leading as "harmless" (J.A. 2703).

The Judge permitted counsel for Local No. 377 to call Local No. 377 officials Eliser and Seidita to testify with respect to the efforts which O'Neill allegedly made to prevent or terminate the Strike, even though O'Neill, in his discovery deposition, had not claimed that either of these

men was involved in efforts to control the Strike (J.A. 2678-2679), and even though neither man was identified as a witness in Local No. 377's Pretrial Memorandum or its Supplement filed in June of 1973 (J.A. 2793-2795, 2801-2806).

In rebuttal, plaintiffs called Robert Eazor and John W. Pelino, Esquire, who represented the plaintiffs at the negotiations in Cleveland at which O'Neill claimed there had been the offer to settle which Judge Teitelbaum felt to be reasonable. Both denied that any such offer was ever made (J.A. 2312-2313, 2316-2317, 3085-3086).

J. The Trial Court's Decision as to Liability

The trial court rendered its decision as to liability on March 30, 1973 (App. 2a-20a). The court did find that the International as well as the Locals was a party to the contract, but had little choice but to so conclude on the basis of the Agreement itself and the facts admitted in the Pretrial Stipulation.

With respect to plaintiffs' prime contention, namely, that the Unions were liable for the Strike from its inception because the same was called by O'Neill, the court found for the defendants, although conceding that "* * * the circumstances and sequence of events (surrounding the inception of the Strike) are undeniably suspicious" (App. 6a-8a).

The court imposed liability on all defendants for failure "to exercise every reasonable means to end the strike." But he greatly weakened that conclusion by summarizing and accepting at face value the testimony belatedly given by union officials, such as O'Neill, as to their alleged efforts to terminate the Strike (App. 12a-15a).

K. The Trial as to Damages

The Petition notes at several points that the trial as to damages was lengthy, but gives no inkling as to the

nature of the testimony offered or the reasons why eleven trial days were required.

By a series of orders entered prior to the final pre-trial conference and at that conference, the court had made very clear that the trial was to proceed without further discovery. The damage schedules on which plaintiffs were to base their direct testimony on damages at trial were identified in the Pretrial Stipulation (J.A. 214), and copies had been furnished to defense counsel before the final pretrial conference (J.A. 3590-3591). Nevertheless, the defendants, for reasons of their own, had elected to pursue no discovery with respect to damages.

However, after the first phase of this case had been decided and trial on the issues of damages scheduled to begin on May 7, 1973, the court scheduled another pretrial conference at the request of Sidney Dickstein, Esquire, of Colson and Shapiro, whose appearance for the International had been entered when the Court was considering the liability issues. At this conference, plaintiffs were required to provide Teamster accountants with immediate access to all Eazor documents which supported their claim. Plaintiffs' counsel agreed to this on the basis of representations that 3½ days would be required for the inspection and with the expectation that at the conclusion of the inspection, the defendants' attorneys would indicate to plaintiffs' counsel any areas in which their experts found themselves in disagreement with the plaintiffs' schedules, so that, hopefully, any adjustments indicated could be agreed to and the time for trial shortened (J.A. 3602-3603, 3800-3801, 4035).

Pursuant to this understanding, plaintiffs did make their books and their director of accounting, Michael Bache, available, and the defendants sent six accountants to plaintiffs' place of business; those men spent 3½ days inspecting documents in the first week of May, 1973, and at Noon on May 5th, their chief advised plaintiffs' counsel that their work was concluded (J.A. 4154). However, on May 7th, when plaintiffs' counsel asked defense counsel inform-

ally concerning the results of the inspection and the possibility of reaching agreement, they refused to furnish any information whatever as to the findings of their accountants.

Plaintiffs' first witness with respect to damages was Robert Eazor, plaintiffs' president. Very early in Mr. Eazor's direct examination, when he was testifying on an entirely different matter, Judge Teitelbaum asked counsel for Local No. 377 to refresh his recollection as to testimony "* * * that on a certain date there was a meeting when the men said they would go back to work if everybody was put back to work and then they would arbitrate the certain people who were in contention" (J.A. 3440-3441).

In their Pretrial Memorandum, plaintiffs identified their damage schedules and their own executives, Thomas and Robert Eazor and Michael Bache, as witnesses (J.A. 132, 123), and the trial court conceded that Robert Eazor is expert in operating a trucking company (J.A. 3252). Nevertheless, Judge Teitelbaum displayed grave initial reluctance to permit Mr. Eazor to express *any* opinions, even on such general matters as to whether, had it not been for the Strike, Eazor would have earned a profit during the Strike months directly involved (J.A. 74-76, 89-90, 99-100). The Judge reconsidered, but, shortly thereafter, summoned counsel to sidebar and indicated that he intended to attach little weight to Mr. Eazor's opinions unless they were otherwise supported; plaintiffs' counsel pointed out, in response, that the opinions of Mr. Eazor would be entitled to substantial weight if, as ultimately proved to be the case, none of them was contradicted by any expert or factual testimony offered by the defendants.

An important feature of plaintiffs' damage claim was evidence that, from the time the Strike ended until the conclusion of the damage claim period on March 31, 1970, plaintiffs sustained *a continuous loss of volume* in general commodities traffic averaging approximately 10,000 tons per month (J.A. 3240-3241; 638a-639a). Robert Eazor testified that this problem was at least partially attributable to

plaintiffs' loss of hundreds of experienced drivers during the Strike, its inability to replace them at all for many months, and with satisfactory drivers for a much longer period (J.A. 3239-3243, 3287, 3359-3360). The testimony as to the shortage of drivers was fully corroborated by reports which Eazor and Daniels filed at the time with the ICC (1161a). Nevertheless, Judge Teitelbaum commented, as soon as he heard the testimony, that the claim was "highly speculative" (J.A. 3267).

Plaintiffs' second witness as to damages was the sales manager for Daniels and the person most familiar with the sales patterns associated with the Warren terminal (J.A. 3500-3504). This witness testified to a complete loss of business from specific Warren customers and to a permanent impairment in the volumes of freight shipped by five others after the Strike. He also testified to the contemporaneous statements of those shippers as to their reasons for providing Daniels with no, or only limited amounts of freight when their business was solicited after the Strike, i.e., the customers had turned to alternative sources and were satisfied with them (J.A. 3504-3568). Although this testimony was clearly admissible as indicating the then current state of mind of the customers, and plaintiffs cited the cases which so held, Judge Teitelbaum said at the time that he would not consider the testimony, and ultimately he did not do so (J.A. 3522-3525, 3239-3240).

Plaintiffs' third damage witness was Michael Bache. Bache did not testify until May 10, 1973, at which point the defendants' accountants had been meeting with him and examining the plaintiffs' damages schedules and supporting records for one week (J.A. 3588-3589). There is a Rule in the trial court which requires parties to furnish each other with copies of "all reports * * * of any expert whom a party expects to call as a witness at trial" (J.A. 3591). The Pretrial Stipulation filed with the Court on April 13, 1972, referred to a series of schedules prepared by Mr. Bache which set forth in detail the calculations on which plaintiffs' damage claims were based (J.A. 214). It was these

very schedules which the Teamsters' accountants began auditing the week before trial began (J.A. 3594).

Immediately before Bache testified, plaintiffs' counsel asked defendants' counsel for copies of the reports of their experts (J.A. 3568-3589). Mr. Dickstein claimed that his accountant had not yet completed his report "and it would to a very large extent * * * depend" on what Mr. Bache would testify (J.A. 3589). Counsel for Local No. 377 stated that he was not required to comply with counsel's demand, because plaintiffs themselves had not complied with the local Rule (J.A. 3589-3590). Plaintiffs' counsel argued that production of Mr. Bache's schedules constituted compliance, but Judge Teitelbaum ruled, without even looking at the schedules, that they did not (J.A. 3590-3595). He then required plaintiffs' counsel to call Mr. Bache as a witness without being furnished in advance with the copies of any reports from Teamster accountants on the ground that, unless plaintiffs' counsel was willing to proceed on this basis, the court would not permit Mr. Bache to testify at all (J.A. 3592-3597).

As was to have been anticipated under the circumstances, Bache's cross-examination proved to be a long and tortuous one (J.A. 3781-3963), devoted principally to questions establishing that the monthly operating statements on which Bache's testimony as to operating losses was based included estimates and so-called "flopover" items, i.e., items related to prior periods, which plaintiffs' counsel had anticipated would be adjusted after they were audited by Teamster accountants, and had they furnished reports (J.A. 3801). Accordingly, plaintiffs closed their case with the express understanding that Bache would be called in rebuttal if, as anticipated, the Teamsters accountants testified to proposed adjustments of Bache's figures (J.A. 4035-4038).

The International called as its first witness John Dwyer, the most senior of the four accountants retained by the International, who, by this time, had spent approximately 35 man-days examining Eazor records (J.A. 4154-4170). Dwyer testified to adjustments to Bache's schedules

which, if accepted, would have indicated that Eazor sustained a loss of only $475,000 during the months of August and September, 1968 (1167a). Nevertheless, Dwyer expressly limited his testimony to adjustments which he had made in Bache's figures and refused to express an opinion as to whether, in fact, Eazor would have sustained a loss in either August or September, 1968, had it not been for the Strike, or the amount of such loss (J.A. 4079, 4081, 4083). Likewise, he was neither asked, nor did he testify to, his opinion as to the validity of plaintiffs' contentions concerning the long-term consequences of the Strike.

At the end of the first day of Mr. Dwyer's cross-examination, the Judge had a brief discussion with plaintiffs' counsel and Mr. Dickstein, which has not been transcribed. In essence, after noting the vast discrepancy between the Bache and Dwyer figures, the Judge asked whether counsel could not agree on some intermediate figures. In that connection, the Judge commented that it "should come as no surprise to Mr. Monteverde" that he had no intention of awarding any post-strike damages.

After Dwyer's first day, there was a four week recess during which Eazor's Accounting Department prepared revised schedules (855a, 856a) of operating losses, calculated in the manner advocated by Teamster expert Dwyer (J.A. 4468-4471, 4575-4579). Copies of these schedules were furnished to defense counsel when trial resumed, and they were also supported by detailed work sheets of adjustments (J.A. 4575-4579). Defense counsel were also tendered copies of these and an opportunity of auditing the revised schedules (J.A. 4499-4500, 4616-4620), and their accountants were present when some of this work was being done and suggested certain adjustments (J.A. 4577).

When trial resumed, the defendants called Mr. Bache as their witness, and he testified, on the basis of painstaking efforts made since he testified in May, to each specific adjustment which could be made in the figures for August and September, 1968, by following the methods adopted by Teamster accountants (J.A. 4468-4498); these

adjustments would have reduced the losses in those two months to around $700,000. However, on cross-examination of Bache, plaintiffs' counsel developed that, calculated by the same alternative method, the loss over the five-month period of August through December, 1968, would very closely approximate that which would be shown as having been sustained solely in the months of August and September, 1968, by following Bache's original accounting method. Bache also demonstrated that the nature and extent of the 1.1 million dollar loss disclosed by both methods could also be confirmed by working back from Eazor's year-end audited figures, and by calculating the loss solely on the basis of the gross profit lost on the revenue which the evidence showed was lost through the period (J.A. 4603-4640; 855a-856a).

L. The Trial Court's Decision as to Damages

Contrary to assertions made in the Teamsters' Petition, Bache's revised schedules did not constitute a substitution by plaintiffs for their original schedules, which were based on plaintiffs' operating statements. The purpose of the revised schedules submitted in rebuttal was to show that, no matter which of four methods one followed in calculating the direct Strike losses, the final figures were approximately the same.

Judge Teitelbaum filed his opinion as to damages (App. 21a-27a) on June 10, 1974. He found that Eazor-Daniels actually sustained losses of One Million Seventy-nine Thousand Three Hundred Thirty-two Dollars ($1,079,-332) during the Strike months of August and September, 1968 (J.A. 676), and this figure conformed exactly to calculations made on the basis of Eazor's actual operating statements for those months, adjusted so as to substitute actual expenses for certain expenses which were only estimated when the original statements were prepared (855a).

He concluded that plaintiffs would have earned no profit during the Strike months even without the Strike (J.A.

26a-27a), and he refused to assess the defendants with liability for any of the damages which plaintiffs sustained during the Strike but subsequent to September 9, 1968, on the ground that, on that date, allegedly, Eazor rejected the alleged Union offer to have all striking employees return to work pending the arbitration of the original two discharges and the subsequent discharges of the strike leaders (App. 33a-36a).

Judge Teitelbaum also rejected in its entirety plaintiffs' claim for damages continuing after the Strike, including $264,000 in interest expense, on the alternative grounds that such damages were not foreseeable and in any event were attributable to some other cause (App. 26a-30a).

Finally, the trial court deducted from the August and September losses $52,108 which plaintiffs' paid for counsel fees (App. 36a). This decision was based on the Judge's conclusion ". . . plaintiff has failed to sustain its burden of proving what portion, if any, of the legal expenses it incurred were directly related to the strike". This, too, was directly contrary to the Record and a position which not even the defendants had taken in their Briefs.

Again, although specifically requested to do so, the Judge refused to support his decision with any detailed findings, and many of his most important conclusions involved an arbitrary refusal to consider very material facts established by evidence which was both uncontradicted and unimpeached.

M. The Decision of the Court of Appeals

The long and carefully crafted Opinion of the court of appeals was written by Senior Judge Albert B. Maris. There were no dissents, and a petition for rehearing was denied. In summarizing that decision in the Statement of the Case and, indeed, throughout their Petition, petitioners create the impression that the courts below held that a duty to use every reasonable means to terminate a strike not authorized by a union at its inception is to be implied from

every "no strike" clause. But what the court below actually held was that the particular no strike clause involved in this case, because of its wording, included such a collateral obligation (App. 52a-56a).

Petitioners, in their Statement of the Case, also fail to characterize either accurately or completely the alternative grounds assigned by the court of appeals for imposing liability. The "mass action theory" was applied here because the evidence, summarized previously herein, showed that, from the inception of the walkout and for long periods thereafter, every single one of the approximately six hundred members of the defendant local unions who were employed by the plaintiffs participated in the Strike (App. 51a; J.A. 2296-2297), and that the picket lines established by those strikers were observed by members of other Teamster locals throughout the Eazor-Daniels system (J.A. 345-346), even though, under the National Master Freight Agreement, all of the Eazor-Daniels Teamsters were members of a single bargaining unit and parties to a contract which prohibited strikes pending exhaustion of remedies available under the grievance procedure (J.A. 256; J.A. 1418). The court of appeals noted that the premise of the "mass action theory" is that "large groups of men do not act collectively without leadership", and that it is for that reason that "a functioning union must be held responsible for the mass action of its members" (App. 57a).

Also relevant to the court's imposition of liability under the "mass action theory" was its related findings that "* * * here, * * * job stewards and committeemen, union functionaries * * * instigated, participated in, or actively encouraged members to continue their unauthorized work stoppage * * *" (App. 57a); that union liability under these circumstances can be based on common law agency principles (App. 57a); and that "* * * a principal may ratify, by subsequent conduct inconsistent with repudiation, an agent's unauthorized acts earlier disaffirmed by the principal * * *" (App. 58a). In this connection, the court pointed out (App. 58a) that other courts

which have imposed liability upon the theory of mass action or agency or both "* * * stressed the failure of the unions involved to take steps, other than written and oral exhortation, speedily to terminate illegal strikes as an indication of passive acquiescence in the strike" (App. 58a).

The court of appeals considered, and rejected, Union arguments based on the so-called "steward's clause" in the National Master Freight Agreement on the ground that its purpose was to limit union liability "for any unauthorized acts" of job stewards and their alternates (App. 52a-53a). Considered, too, was language in the Central States Supplements (App. 53a-54a) purporting to absolve the Union from liability "for damages resulting from * * * unauthorized acts of its members" during unauthorized strikes. The court noted (App. 53a-54a) that, in the very next sentence of the same supplements, the Unions agreed, notwithstanding, to "* * * undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work * * *." Therefore, the court of appeals said (App. 53a-54a), the second limitation of liability, like that pertaining to the unauthorized acts of job stewards, "* * * did not relate to or purport to relieve the unions from their own express promise 'that there shall be no strike . . . without first using all possible means of a settlement * * * of any controversy which might arise.' * * * It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part" (App. 55a).

The Petitioners also state, in their summary of the decision of the court of appeals, that the court "in effect converted the 'every reasonable means' obligation into a duty to hold Eazor harmless from any damages resulting from the strike." But what the court of appeals actually said was this (App. 59a-60a):

> "* * * no effort was made to discipline or remove the job stewards and committeemen who were organ-

izing and leading the strikes,[4] to suspend or fine the striking union members, to place the local unions in temporary trusteeship, or even, until the very end of the strike, to take the votes of union members by secret ballot. Stronger measures, such as these, were indicated, were available and should have been taken to the extent necessary.

"* * * whether the use of the stronger measures which were available would actually have been successful in ending the strikes is beside the point. It was highly probable that they would have been since the use of only one of them in an earlier strike by a Teamsters local against Eazor had been sufficient to end it.[4] The point here is that the unions were contractually obliged to carry out their agreement that there should be no strike by employing *all* reasonable means available to them to seek to end the existing unauthorized strikes and this they failed to do. Having thus chosen not to try out those stronger measures which were available, indicated, and probable of success they cannot be heard to say that such measures, if employed, would not have been successful in ending the strikes in this case and that, accordingly, it was not necessary to try them * * *."

Although the court of appeals did not specifically allude to this, its conclusions in this regard were also buttressed by the evidence of Eazor's previous problem free labor relations history and Thomas Eazor's splendid relationship with the Eazor men in Pittsburgh prior to the

4. That such discipline has been successfully used by a Teamsters local and that its use might well have been successful here is indicated by the case of an unauthorized strike by members of Local 241 of the Teamsters International Union against Eazor at Sharon, Pennsylvania during the April, 1968, strike (see page 11, *supra*) which ended at Sharon when a steward who refused to cross the illegal picket line was removed by the officers of the local union and another put in his place who led most of the strikers back to work across the picket line (J.A. 273, 291-292).

Strike (J.A. 2883, 2895); the fact that only two Local No. 377 men, with resort to the grievance procedure, were involved in the origin of the Strike (J.A. 998-1024, 1079-1081); testimony that only 9-10 men at Warren objected to Eazor management and that some Local 377 men wanted to work throughout the Strike (J.A. 1077-1078, 1820-1822, 1308, 1315, 1332), and the admission by the President of Local No. 249 that, at the inception of the Strike, the men in Pittsburgh were angrier with the Union than they were with Eazor, and that most wanted to return to work (J.A. 2884-2892).

With respect to damages, the Petitioners claim that the court of appeals sanctioned the trial court's failure to make specific findings as to the steps which it followed in establishing plaintiffs' direct strike loss to be $1,079,332, and that the court of appeals then refused to reexamine the lower court's decision on this issue. Actually, as noted *supra*, the finding of the trial court in this regard was in accordance with Proposed Findings of Fact (J.A. 452-508) and Briefs (Supplemental Appendix 176b-241b, 332b-437b), all based upon and carefully annotated to the Record, submitted to the trial court by plaintiffs and printed in the Appendices below, along with the responsive sets of Proposed Findings and Briefs filed by the defendant Unions. The Unions, in their primary Brief below (pp. 40-41), pointed out that "* * * there were no issues of credibility, but only questions as to which approach (of the competing accountants) appeared the more persuasive * * *"; then the Teamsters themselves suggested that this issue was one which "the appellate court may proceed to decide * * * without remand."

That the court of appeals did not accept the lower court's decision on this issue arbitrarily, but only after reviewing the evidence itself, is also clear from its Opinion. (App. 65a).

Nor was the court of appeals cavalier, as the Petitioners imply, in its review of the trial court's award of pre-judgment interest. The court of appeals noted (App.

76a): "When damages resulting from a breach of contract are ascertainable with mathematical precision, pre-judgment interest is awardable as a matter of right. If * * * the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add pre-judgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation * * *." Then, the court held that these were appropriate rules for discretionary application in this case, and that the district court had not erred in their application (App. 77a).

REASONS FOR DENYING THE WRIT

I. In Imposing Liability, the Court Below Decided No "Questions of Almost Universal Import" But, Rather, Properly Interpreted the Particular Contract Involved In This Case.

A. The Contract Imposed Duties With Respect to All Strikes.

While the court of appeals did refer to matters of general policy by way of justification for its ultimate conclusion on the liability issue, the fact is, and the Opinion of the court of appeals makes very clear, that the decision in this case was based on the language of the particular contract involved and not on matters of general labor policy (App. 52a-56a).

Set forth below are the comparable provisions of the Local Supplements involved which, with the National Master Freight Agreement of April 1, 1967, were all negotiated contemporaneously on behalf of all of the Unions involved by the National Union Committee of the International Brotherhood of Teamsters (J.A. 166-167, 169-171):

Teamsters Joint Council No. 40 (Local 249) Supplements (J.A. 305a-307a)	
Article 44.	
Section 1. The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.	(The balance of this section describes the step by step procedure to be followed in handling grievances.)
	(There is no provision comparable to Section 2 of Article 43 of the Central States Area Supplement.)

Central States Area—Ohio (Local 377) Supplements (J.A. 348a-350a)

Article 43.

The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

Section 1. (This section is devoted entirely to a description of the step by step procedure to be used in handling grievances.)

Section 2. It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice, which notice will list the Union's authorized representatives who will deal with the Employer, make commitments for the Union generally, and in particular have the sole authority to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. The Union may from time to time amend its list of authorized representatives by notification by Certified Mail. It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement the Union shall not be liable for damages resulting from such unauthorized acts of its members.

While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above,[5] it is specifically understood and agreed that the Employer during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any re-

5. This emphasis has been supplied by the writer of this Brief.

course to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slow-down, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. * * *

A fair reading of the parallel provisions quoted above establishes clearly that both involve identical prohibitions against strikes, but that the Central States Area (Local 377) Supplements include additional language whose purpose was to limit Union liability somewhat for strikes which were not authorized at their inception by a designated union representative, *while preserving, nevertheless, the Unions' duty to exercise "every reasonable means" to end such strikes, even if unauthorized*, which duty would necessarily be implied from the initial "no strike" pledge found in both forms of Supplement if they were standing alone.

This is exactly what the court of appeals said on this (App. 55a-56a):

> "* * * The reference in the clause to an 'unauthorized stoppage of work mentioned above' is a recognition that this obligation exists notwithstanding the unions' release from liability for its members' unauthorized strike activities which is contained in the immediately preceding paragraph. Moreover, the clause functions here as a drafting device to make it clear that the right which the paragraph confers on the employer does not operate to abrogate that union obligation, which is to continue side-by-side with the employer's right. Thus the recital is a recognition of the unions' implied obligation continuously to endeavor to end an unauthorized strike. Since the obligation is one which is implied from the no-strike

clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted. And since the no-strike clause appeared in all the supplemental agreements involved in this case, it necessarily follows that the unions had a similar obligation under the agreements applicable to each of them, respectively, to use all reasonable means to end a strike existing in violation of that clause, regardless of the presence or absence of a recital of the obligation in the agreements to which a particular union was a party. * * *

Furthermore, to the extent that any duty by implication was recognized to exist in this case, the feat of construction involved was not substantially different from the duty not to strike recognized to exist by implication in *Teamster Union v. Lucas Flour Company*, 369 U.S. 95 (1962); *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 374 (1974); *U. S. Steel Workers v. Warrior & Gulf Nav. Coal Co.*, 363 U.S. 574 (1960); *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 551, 553-556 (6th Cir. 1970); *Armco Steel Corp. v. United Mine Workers of America*, 505 F.2d 1129 (4th Cir. 1974).

Petitioners argue that the decision of the Third Circuit in this case conflicts with the decision of the Fourth Circuit in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (1955), *cert. denied*, 350 U.S. 847 (1955). The international union involved in that case was not even a direct party to the collective bargaining agreement in issue there, and that agreement included no express obligation on the part of the union with respect to strikes. Notwithstanding, the officials of the international union succeeded in persuading the wildcat strikers to return to work within two days after the walkout began, and on the employer's terms. In the present case, the court of appeals

stated (App. 51a): "We do not read the *Haislip* case as authority for the defendants' position" because "* * * there was nothing in the contract (involved in *Haislip*) making the defendant union liable for * * * unauthorized strikes * * * or requiring that it take any action with regard to it."

More recently, the Fourth Circuit itself recognized this to be a valid basis for distinction between *Haislip* and *Eazor* and further stated that the Opinion of Judge Maris in the present case "* * * is consistent with * * * the views we express in this Opinion." *United States Steel Corp. v. United Mine Wkrs. of Am.*, 519 F.2d 1249, 1255 (1975).

Petitioners also suggest that the decision below is contrary to the labor relations policy espoused in *H. J. Heinz & Co. v. Labor Board*, 311 U.S. 514, 523-526 (1951), which holds that it is an unfair labor practice to refuse to reduce a collective bargaining agreement to writing. The duty which the court below held existed here *is* established by a written contract. In that contract, the Unions specifically agreed that "* * * there shall be no strike * * * without first using all possible means of settlement." It is the Teamsters, rather than the plaintiffs, who desire to have that language rewritten. They wish the contract interpreted to read: "* * * there shall be no strikes *authorized by the Unions* * * * without first using all possible means of settlement." But that is not what the contract says.

Petitioners postulate enormous complications in negotiating new collective bargaining agreements if the *Eazor* decision is permitted to stand. The decision of the trial court, which is no different on this issue than the decision of the court of appeals, was rendered almost three years ago, and no learned commentator has predicted, nor do any intervening statistics indicate that affirming that decision will have any adverse effect whatever on collective bargaining. Indeed, one author has stated, of the district court's decision, 19 Vill. L. Rev. 665-671 (1974), "Perhaps the most important positive effect * * * will be

the promotion of cooperation between management and labor * * * (which) * * * will be an important step in further promoting peaceful resolution of labor disputes."

Another specter posed by the Teamsters is the asserted likelihood that the *Eazor* decision will be interpreted as inconsistent with the holding of this Court in *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270 (1956), that even the broadest "no strike" clause does not prevent employees from striking to prevent an employer from interfering with the collective bargaining process by summarily firing an employee solely because of his organizational activities. That this argument is but a strawman becomes patently clear when one considers that, in *Eazor*, the Third Circuit cited with approval *Penn Packing Co., Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local 195*, 497 F.2d 888 (1974), in which, after the district court decision as to liability in *Eazor*, the same Court of Appeals interpreted another union's outright guarantee against all strikes as an implicit obligation to do no more than to take reasonable and timely steps to end strikes which were not authorized by the union. Such steps were taken by the union in the *Penn Packing* case, the strike was terminated by the international union within forty-eight hours, and no liability was imposed on the union.

Petitioners argue (Petition, p. 21) that, heretofore, everyone interpreted "no strike" clauses as meaning only that the unions involved would not "authorize, participate in or ratify work stoppages during the life of the Agreement." No authority is cited in support of this assertion, and this Record shows that, from the inception, Eazor management understood that the Local and International Unions involved had an obligation to take active steps to terminate unauthorized as well as authorized strikes. Eazor management testified that this was their understanding (J.A. 1418-1419, 1539), and no Teamster official took the stand to state that the Unions had any different understanding. Indeed, as noted before (Footnote 2, *supra*),

Eazor instituted suit on the day after this Strike began, and on the basis of the same theory on which liability was ultimately imposed.

In addition to daily telephone calls to International officials requesting their assistance during the Strike, Eazor officials made two trips to Washington in a fruitless effort to stimulate International officials to act (J.A. 1444-1448, 2329-2334, 2386). Also, during the Strike, Eazor officials urged Union officials to take the same type of disciplinary steps which the courts below eventually found could and should have been taken in this case, namely, imposing fines, removal of strike-leading stewards, suspensions of the union privileges of strikers, and/or the imposition of trusteeships on the locals (J.A. 2391-2392).

Petitioners also argue that management, heretofore, has relied for protection against wildcat strikes on its privilege to discharge or otherwise discipline those who lead or participate. But, an official of the International himself conceded that large scale discharge of experienced workers who happen to be union members engaged in an authorized strike is not a practical remedy for an employer; the employer merely penalizes himself by the discharges, while, as occurred here, the experienced employees terminated readily obtain employment elsewhere in the industry (J.A. 2971-2972).

Citing a 1948 prediction by Professor Cox[6] as to how Section 8(a)(3) of the Labor Management Relations Act of 1947 *might* be interpreted, petitioners claim that, in holding that there were effective disciplinary steps, including fines, suspension or termination of Union membership, available to the Unions which were not taken (App. 59a), the court below failed to appreciate that, in 1947, Congress reduced the disciplinary powers of unions over their own members. In *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), Professor Cox notwithstanding, this Court held

6. Some Aspects of the Labor Management Relations Act 1947, 61 Harv. L. Rev. 274, 298-299 (1948).

that a union could fine as well as expel members for crossing a valid picket line; certainly the converse is true. Indeed, in *Falcone v. Dantinne*, 420 F.2d 1157 (3d Cir. 1969), the court below recognized, by necessary implication, the propriety, after a due process hearing, of a union's decision to suspend a member, and for five years, for advocating a strike not authorized by the union.

This Court's decisions in *Radio Officers v. Labor Board*, 347 U.S. 17 (1954), and *Labor Board v. General Motors*, 373 U.S. 734 (1963), both of which are cited by the Unions in this connection, are in no way inconsistent with the decision of the court below here. Equally wide of the mark are the arguments advanced at pages 23 and 24 of the Petition with respect to the remarks of the draftsmen of the Labor Management Relations Act of 1947. Clearly, this is not a case in which courts have read a no strike promise into an agreement; it is a case in which courts have held that unions who have contractually agreed that "* * * there shall be no strike" must take whatever reasonable steps are within their power to terminate any strike which violates the agreement, by attempting, among other things, to discipline striking members. As the Seventh Circuit noted in *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers Union*, 452 F.2d 49, 53 (7th Cir. 1971), Senator Taft, in the Senate Debate on Section 301, specifically said that "* * * wildcat strikers ought to be disciplined if they prevent a responsible labor leader from performing his agreement."

Equally irrelevent here are decisions such as *Porter Co. v. NLRB*, 397 U.S. 99 (1970), in which it was held that the N.L.R.B. cannot compel an employer to agree to a check-off in negotiating a collective bargaining agreement; and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Howard Johnson v. Hotel Employees*, 417 U.S. 249 (1974), in both of which the Court held that the N.L.R.B. cannot compel an employer, who has no collective bargaining agreement with the employees involved, to honor the provisions of a collective bargaining agreement which a

previous employer had with a union representing some of those employees.

B. "Mass Action" Was an Appropriate Theory.

We consider next the Petitioners' arguments with respect to the application to this case by the court of appeals of the so-called "mass action theory." This theory has been recognized and applied not only by the Court of Appeals for the Third Circuit but by other courts of appeals: *Wagner Electric Corp. v. Local 1104*, 361 F. Supp. 647 (E.D. Mo. 1973), *aff'd*, 496 F.2d 594, 596 (8 Cir. 1974); *Vulcan Materials v. United Steelworkers of America*, 403 F.2d 446, 455 (5 Cir. 1970), and *Local No. 21, United Textile Workers v. Newberry Mills, Inc.*, 238 F. Supp. 366, 373 (W.D.S.C. 1965). This principle is applicable to the liability of a union which is a party to a collective bargaining agreement, both because it may be said to have undertaken to supply performance by a third party, and because, as the court below emphasized (App. 64a), §301(b) of the Labor Management Relations Act (29 U.S.C. 185(b)) precludes recovery of damages from individual union members.[7] Since individual members cannot be liable in damages for refusing to work, the employer, in a very real sense, could have a remedy against no one when it came to enforcing a "no strike" clause against a union which denied responsibility for the mass refusal of its members, allegedly acting independently of their union, to work.

The Petitioners argue that the foregoing is inconsistent with decisions in the Fourth Circuit such as *Haislip, supra*, and the Sixth Circuit in *Lewis v. Benedict Coal Co.*, 259 F.2d 346, aff'd in part and reversed in part, 361 U.S. 459 (1960), and *North American Coal Corp. v. Local Union 2262, etc.*, 497 F.2d 459, 467 (1974). We have previously

7. *Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers International Union*, 452 F.2d 49 (7th Cir. 1971).

distinguished this case from *Haislip*. In *Lewis*, it was held that liability could be imposed on a union for an allegedly unauthorized strike in which masses of its members participated where, as in the present case, there was evidence that a union official with authority to settle the labor dispute involved had, in fact, encouraged the strike. That evidence was not dissimilar to evidence in the present case that Thomas Fagan, President of Local 249, at the time he instructed his members to return to work, also told them that they could, if they wished, observe the illegal picket line established by the members of Local 377 (J.A. 2910-2911). See also, in accord, *Blue Diamond Coal Company v. United Mine Workers of America*, 436 F.2d 551, 558-559 (6th Cir. 1970).

North American Coal Corp. v. Local Union 2262, United Mine Workers of America, supra, the second decision from the Sixth Circuit cited by Petitioners, is actually consistent with the ruling of the court of appeals in the present case. There, the court reversed the convictions of various union officials for criminal contempt. The prosecutions resulted from the mass refusal of union members to obey, over a four day period, a temporary injunction intended to terminate an unauthorized strike. The convictions of the union officials were overturned solely because they had been entered notwithstanding extensive testimony, which the trial court accepted at face value, as to the good faith efforts of all of the individual defendants to require the union members to return to work. However, the court of appeals recognized that the same evidence was sufficient to justify prosecution, in an appropriate procedural manner, of the union involved. The court said (497 F.2d 467):

> "Clearly, there was a strike which did continue after issuance of the injunction. The strike was the subject of discussion at local union meetings. There was effective support for the strike voiced at one such meeting. * * * "

Petitioners conclude their argument under this heading with a quotation from Chief Justice Taft in *Coronado*

Coal Co. v. United Mine Workers, 268 U.S. 295 (1925), and argue that it is improper to impose liability on unions for the unauthorized acts of only some of their members, even though they constitute all union members employed by a particular employer. If this argument were valid, no liability could ever be imposed on any union for an illegal strike unless a majority, or perhaps all, of its members participated. No court has ever held that this is so.

Petitioners also argue that it is unfair to impose liability here for the actions of approximately 600 Union members. This argument is factually erroneous because, as we have noted several times before, the picket lines established by the members of the two Locals directly involved were recognized by the members of many other Teamster Locals throughout the nation, even though they, too, were parties to the National Master Freight Agreement and no strike clauses in area supplements. In any event, as the court below made very clear, liability was imposed here, not for the actions of individual Union members, *but for the prolonged and complete abdegnation of responsibility on the part of the highest officials of the International Brotherhood of Teamsters and its Locals* with respect to the performance of the express contractual obligations of their Unions with respect to terminating strikes by Union members. As Judge Maris noted (App. 54a-55a):

> "By these restrictions upon the liability of the unions the employers were undoubtedly bound. But they involved only liability for the unauthorized strike action of job stewards and individual union members. They did not relate to or purport to relieve the unions from their own specific promise "that there shall be no strike . . . without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." This promise was binding on the unions as such, as well as on the union members, and it did not necessarily involve assump-

tion by the unions of responsibility for unauthorized strike action of the individual members. While it was not a 'no fault' guarantee against any work stoppage, *Penn Packing Co., Inc. v. Amalgamated Meat Cutters, Local 195*, 3 Cir. 1974, 497 F.2d 888, 890, it did involve the obligation of the unions, which was necessarily implied in their promise, not only not to call a strike themselves but also to take timely steps to end such an unauthorized strike by employing any and all such reasonable means at their command as might be needed to get their members back to work. It was the breach of this obligation by the unions, not any responsibility for the particular unauthorized actions of their members, which generated liability on their part."

II. The Court of Appeals Acted Properly in Awarding Damages and Interest.

A. Strike Losses

Petitioners are correct in stating that the trial judge, after hearing eleven days' testimony, made no specific findings of fact and gave no detailed explanation in his Opinion as to how he calculated the amount which he determined to be plaintiffs' operating losses during the Strike. What is not stated is that, when the trial judge acted in this manner, he did so although counsel for all parties submitted detailed Requests for Findings of Fact and Briefs carefully annotated to the Record. Furthermore, the parties most aggrieved by the trial court's refusal to make detailed findings were the plaintiffs since, by acting as he did, the trial judge found it possible to justify blanket elimination of the great bulk of plaintiffs' claim, even though the evidence as to plaintiffs' losses and their relationship to the Strike was both strong and almost uncontradicted.

Nevertheless, with respect to the single damage claim as to which the trial judge did make a substantial award, namely, plaintiffs' direct operating losses during the Strike, it is possible to establish exactly the basis of the trial judge's reasoning, for his ultimate finding was directly in accord with the operating losses reflected on Eazor's consolidated monthly operating statements for the Strike months of August and September, 1968 (3 J.A. Exhibits 807a-809a), after substitution of actual expenses for certain items which were unknowable and, therefore, only estimated, when the statements were prepared.

The original figures from the monthly statements, and the adjustments, are as follows:

	August	September
Profit or Loss per monthly statements	$(601,577)	$(618,973)
Rev. Adjustment		(67,500)
Adjustment of Legal Expense due to Strike		(4,919)
Adjustment of State Unemployment Compensation Expense	(4,983)	(8,209)
Adjustment of Workmen's Compensation Expense	(13,701)	(22,856)
Adjustment of Group Insurance Expense		(15,050)
Adjustment of Prepaid Tire Expense	(2,000)	(2,000)
	$(580,893)	$(498,439)

The justification for each of such adjustments was explained in Eazor's primary Brief as to damages in the trial court (Supplement Appendix 206b-207b) with precise anno-

tations to the Record. For the benefit of the court of appeals, the Requests for Findings which the parties had filed in the court below were printed in the Appendix and the Briefs filed there in a Supplemental Appendix. Accordingly, to review properly the propriety of the trial court's finding as to the extent of plaintiffs' operating losses during the Strike, the court of appeals was required to do no more than review the Proposed Findings and Briefs in the court below. And *all parties* urged that this be done and a decision rendered without remand. At page 40 of the primary Brief filed in the court of appeals by the International the following was stated:

> "When a trial judge has failed to comply with the requirements of Rule 52(a) or where a finding is set aside as clearly erroneous, a reviewing court is left with two choices. It can remand to the district court for proper findings as was done in *O'Neill*. Alternatively, where the essential evidence is documentary and the case does not turn on questions of credibility, the appellate court may proceed to decide the case without remand. *Surgical Supply Service, Inc.* v. *Adler*, 321 F.2d 536, 539 (3 Cir. 1963); *State of Maryland* v. *United States*, 329 F.2d 722, 723 (3 Cir. 1964); *McComb* v. *Utica Knitting Co.*, 164 F.2d 670 (2 Cir. 1947)
>
> "The strike period loss issue in this case readily lends itself to the latter treatment. The amounts of each proposed adjustment are detailed on documents and there is no dispute as to either the calculations or the accounting data upon which those calculations were based. While the accounting experts differed as to the propriety of some of these adjustments, there were no issues of credibility, but only questions as to which approach appeared the more persuasive. And after Eazor submitted its own recomputations, the differences between the parties narrowed to only ten proposed additional adjustments (See 2JA 652-653)."

To the authorities cited by the International should be added the following: *Swanson v. Levy*, 509 F.2d 859 (9th Cir. 1975); *Neill v. Diamond M Drilling Co.*, 426 F.2d 487, 491 (5th Cir. 1970); *B. F. Goodrich v. Rubber Latex Products, Inc.*, 400 F.2d 401 (6th Cir. 1968).

The Opinion of the court of appeals makes it very clear that, before affirming the trial judge's decision on this issue, the court of appeals itself reviewed his reasoning. The court said (App. 65a):

> "The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. * * * All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous."

The decisions which Petitioners now cite on this question are ones in which courts of appeals, in other situations, chose to exercise their discretion to remand to a lower court for specific findings. Certainly, however, there is no reason whatever for this Court to grant certiorari to review the differing practice adopted by the court of appeals in the present case when its decision in that regard was not only discretionary and supported by another line of cases, but directly in accord with the expressed wishes, at the time, of all of the parties to this litigation.

B. Prejudgment Interest

Finally, Petitioners urge that, even if there is no other basis for granting certiorari, this Court should do so solely because the trial court held that plaintiffs were entitled to prejudgment interest on the relatively modest award which

they received, and that holding the court of appeals reviewed and held to be proper, under the circumstances without assigning specific reasons for its conclusion.

Petitioners concede that this Court has never held that the requirement of Rule 52(a) dictates that either district courts or courts of appeals make specific findings with respect to the basis on which prejudgment interest is awarded or denied. That this is so is the best indication we know of what small moment is this issue to federal jurisprudence.

Certainly, the present case, which has already been pending for seven and a half years, is not one whose final disposition should be further delayed for the purpose of clarifying the law in this matter. This is an action for breach of contract in which the only damages awarded consisted of the plaintiffs' operating losses during the period of the Strike, a matter which could be and was the subject of precise calculation by experts produced by both parties, whose only differences, as the Teamsters themselves conceded, involved matters of opinion rather than fact. As the court of appeals noted (App. 76a-77a):

> "The general rule is that when the damages resulting from a breach of contract are ascertainable with mathematical precision prejudgment interest is awardable as of right. If, however, the claim is not for a liquidated sum but is nonetheless pecuniary rather than personal in its nature many courts will add prejudgment interest to the amount which they find would have been just compensation at the time of the breach, when in the exercise of their discretion it appears necessary to do so in order to arrive at fair compensation at the time of judgment. *Miller v. Robertson*, 1924, 266 U.S. 243, 258; *United States v. Bethlehem Steel Corp.*, 3 Cir. 1940, 113 F.2d 301, 308, *aff'd*, 1942, 315 U.S. 289; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 3 Cir. 1956, 235 F.2d 224, 231; *Marrazzo v. Scranton Nehi Bottling Co.*,

1970, 438 Pa. 72, 263 A.2d 336; *Restatement of Contracts* §337; *McCormick on Damages*, 1935, 356."

The court also stated (App. 77a):

"We think that this is an appropriate rule for discretionary application as a matter of federal law in actions brought under section 301 of the Labor Management Relations Act for breaches of labor agreements and that the district court did not err in its discretionary application of the rule in this case."

Plaintiffs believe that, under the general rule, since the only damages awarded in the present case were those ascertainable with mathematical precision, plaintiffs were entitled to prejudgment interest on that award as a matter of right. Certainly, in any event, there is no basis in the Record for concluding that the lower courts erred in awarding prejudgment interest; quite the contrary. Suit was instituted promptly, prosecuted diligently and at great expense by plaintiffs, and required many years before it was tried to conclusion. Furthermore, while the case was pending, plaintiffs incurred hundreds of thousands of dollars in interest expense for loans which they were required to continue or increase as a result of Strike losses (1 J.A. Exs. 636a). These are factors which no doubt led the courts below, and have also caused other courts, to conclude that awards of prejudgment interest are proper. See, in addition to the decisions cited in the Opinion of the court of appeals, *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172 (1975), *certiorari applied for*, No. 75-355.

None of the cases which Petitioners cite on this issue governs here. In *Board of Commissioners v. U.S.*, 308 U.S. 343 (1939), this Court did review and reverse a court of appeals in connection with an award of interest. There, however, the district court had exercised its discretion in *denying* prejudgment interest in a claim by Indians against a county for taxes collected on land which the federal government had obtained from the Indians and later conveyed to the defendant county by patent. The trial court

denied interest because it concluded that, throughout, the county had acted "in all innocence". Such a decision, this Court held, was within the scope of the district court's discretion, and the court of appeals had no right to reverse it. Here, on the other hand, the defendants were not "innocent", the district court did award prejudgment interest, and the court of appeals has concluded that the trial court properly exercised its discretion in so holding.

In *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1976), this Court reversed a court of appeals, which in turn reversed a district court for refusing to award back pay in a civil rights case involving discriminatory practices on the part of an employer. The court of appeals reversed and recognized as valid plaintiffs' entire damage claim. This Court's decision to remand resulted solely from its determination that, at the inception of the litigation, the plaintiffs had disclaimed any intention to claim damages for back pay; therefore, the Court said, there was an unresolved issue as to whether, and if so to what extent, the defendants may have been prejudiced in dealing with palintiff 's claim by the preliminary position taken by their lawyer. This was to be determined on remand.

Again, no similar issue is present here. From the beginning, defendants have denied liability and offered nothing in response to plaintiffs' claim.

Of the remaining cases cited by Petitioners, *Robert C. Herd & Company v. Krawill Machinery Corp.*, 256 F.2d 946 (4th Cir. 1958), aff 'd on another question, 359 U.S. 297 (1959); *McCrea v. Harris County Houston Ship Channel Navigation District*, 423 F.2d 605 (5th Cir. 1970), *cert. denied*, 400 U.S. 924 (1970), and *Wessel v. Buhler*, 437 F.2d 279 (9th Cir. 1971), all involve situations in which courts of appeal reversed district courts for failing to explain why they had *refused* to award prejudgment interest. Certainly, such holdings can be of no comfort to the defendants here; on the other hand, the reasoning of the Court of Appeals for the Fourth Circuit in *Herd & Company* supports the award of prejudgment interest under circumstances such as Eazor's.

Finally, that the court of appeals in *Norte & Co. v. Huffines*, 416 F.2d 1189 (2d Cir. 1975), was not satisfied with the trial court's explanation of its award for prejudgment interest is certainly no basis for concluding that the court of appeals in the present case erred when it concluded, after it reviewed the decision of the trial court in the present case, that the award of prejudgment interest was proper. In this connection, certainly, the court of appeals was also entitled to consider whether, in view of the highly arbitrary manner in which the trial judge had dealt with every other damage claim of the plaintiffs in order to reach his final verdict, he might not behave in a manner equally arbitrary, in the event of a remand, by reversing his original decision with respect to prejudgment interest in a situation where both the general principles of law and the facts cry out for such an award. This, in turn, would have necessitated a further appeal on the question of interest and further delay of the plaintiffs.

The court of appeals was right in concluding that this case must end sometime.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.,
Petitioners

v.

EAZOR EXPRESS, INC., ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM*

I. Liability

A. Respondent contends that the Court of Appeals' holding "that necessarily implied in the unions' agreement that there should be no strike was an obligation on their part to use every reasonable means to bring to an end a strike begun by their members without their authorization" (Pet. App. 50a) is confined to "the particular contract involved in this case" (Opp. 36). This tactic is without merit. It is quite clear from the Court's entire discussion (Pet. App. 50a-57a) [1] that the Court was treating with no-strike clauses as

* Throughout this Reply we will refer to the Petition for Certiorari as "Pet." and the Brief in Opposition as "Opp."

[1] Respondent cites only pages "52a-56a" (Opp. 36), thereby eliminating from consideration the beginning and the end of the Court's analysis.

a class, construed in the light of traditional contract principles and "the policy of our national labor laws," *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456.[2] Even when, in the passage relied on by respondent (Opp. 38-39), the Court addresses itself to the language of the National Master Freight Agreement (NMFA) and its supplements, the Court's reading follows from its view of the nature of no-strike clauses generally—namely, that they would be "illusory indeed" (Pet. App. 50a) unless that duty were implied:

> "Since the obligation is one which is implied from the no-strike clause as necessary for the fulfillment of the obligation of that clause, it is merely recognized as existing, but not created, by the recital of it in the preliminary clause of the paragraph from the Central States Area Local Cartage Supplemental Agreement which we have quoted." (*Id.* 56a).[3]

The holding that the duty arises from the no-strike clause, to effectuate the promise contained therein, is equally applicable to all such clauses; thus, the same

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[2] The sweep of the Court of Appeals' holding is further confirmed by its treatment of *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872 (4 Cir.) cert. denied, 350 U.S. 847. Had its decision rested significantly on any unique language of the agreements herein, the Court would have distinguished the *Haislip* case on that basis; instead, the Court stated the controlling difference to be between those agreements which contain an *express* no-strike clause and those in which a no-strike promise is *implied.*

[3] It was our position in the courts below, and we continue to maintain that Local 377, as a signatory to the Central States Area Supplemental, had expressly agreed to use every reasonable means to terminate the strike, so that as to Local 377, the only liability issue is whether it breached that promise—a question which turns in the first instance on the standard to be applied, see Question 1(c), p. 2 of the Petition. That was also the view of the trial court (Pet. App. 8a-9a), but the Court of Appeals derived the contractual duty exclusively by implication from the no-strike clause in the NMFA (App. 50a-57a).

result would follow in all other cases whether or not the existence of that duty is elsewhere "recognized" in the agreement.[4]

B. On the merits of the liability issues, our reply can be brief.

In relying on Senator Taft's observation that " * * * wildcat strikers ought to be disciplined if they prevent a responsible labor leader from performing his agreement" (Opp. 43), respondents neither cite the Congressional Record nor describe the context of his remarks. The omitted citation is 92 Cong. Rec. 5706 (*1946*). The remark was made in the course of debate on a subsection of the Case bill in the 79th Congress, specifically, a subsection thereof which would have deprived of his "employee" status under the Act any employee who engages in a strike which is in breach of contract and not ratified or approved by the union; this penalty was not provided for in § 301 of the bill which Senator Taft brought to the floor in the 80th Congress or of the Taft-Hartley Act. The precise context was that Sen. Capehart had described a provision in many Mine Workers' contracts at that time whereby the union automatically fined wildcat strikers; in the quoted remarks Sen. Taft was expressing his approval. This is, of course, far short of an endorsement of union liability for unauthorized wildcat strikes where the union has not undertaken to police the agree-

[4] In restating the other liability questions respondents inject factual detail which played no role in the decision below. Under the Court of Appeals' "mass action" theory the union's liability rested entirely on the fact that all the members employed by plaintiffs were involved in the strike and not on any of the other factors detailed in respondents' Question 1(b); nor is there any basis in the Court's opinion for believing that the "evidence" detailed in respondents' Question 1(c) was the reason for the Court's conclusion that the strike would have terminated promptly if only the defendants had replaced the stewards and disciplined the strikers.

ment; in the debates on § 301(b) and (c) in the 80th Congress Sen. Taft expressly and categorically *negated* such liability, see Pet. 27, text and note at n. 22.

Respondents do not accept Chief Justice Taft's holding in *Coronado Coal Co.* v. *United Mine Workers,* 268 U.S. 295 (1925) (Opp. 45-46); they contend that if our argument based on that case "were valid, no liability could ever be imposed on any union for an illegal strike unless a majority, or perhaps all, of its members participated" (*id.* 46). Of course, that would *not* be the result, since under *Coronado* the union is liable for the acts which its officers or agents authorize, participate in or ratify. That, of course, is precisely what Congress intended in enacting § 301(e): When Congress subjected unions to suit as entities and declared that they would be liable for the acts of their agents, but not of their members, Congress established legislatively the same rule which this Court had established as the common law in the *Coronado* cases.

When the lower courts impose liability under § 301 without even addressing themselves to the authoritative statements defining liability made by the sponsor of the legislation, they forget that the "judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted." *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 100. Thus, review is required not only because of the intrinsic importance of the liability issues to labor-management relations, but because it is the ultimate responsibility of this Court to assure that the federal judiciary does not transgress its proper functions.

II. Damages and Interest

A. The Petition for Certiorari presents a pure question of law with respect to the amount of plaintiffs' loss during the strike period which was the "starting point" of the damage calculations in both courts. That

question is whether the failure of the District Court to find specially the facts underlying its determination that the strike loss of $1,079,332 was error. In this Court, respondents agree, indeed insist, that the trial court erred in failing to make adequate findings on the issue of strike loss (Opp. 47), and acted in a "highly arbitrary manner in [dealing] with every other damage claim [excluding interest] of the plaintiffs in order to reach his final verdict" (*id.* 54). Given the express requirements of Rule 52(a) and the decisions of other Circuits (cited at Pet. 45)[5] which have insisted on compliance with Rule 52(a) in the calculation of damages, the propriety of review on this issue should therefore be beyond dispute.

Nevertheless, respondents seek to avoid review of this issue, asserting that the trial court must have arrived at its result by following the argument presented by the plaintiffs to the trial court, and that the Court of Appeals was invited to examine those requested findings and affirmed the trial court on the basis of such review (Opp. 48-50).

There are two independently conclusive answers to respondents' contention: The first is a point of principle: A major purpose of the requirement of specificity in Rule 52(a) is to cause the trial judge to fully and conscientiously consider the basis for his decision. See, *e.g., United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656, n. 4; *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 212, n. 15 (8 Cir.). The more complex the issues, the more important is the discipline of putting on paper the analysis by which a result is reached. Additionally, specificity in the findings focuses the adversary process on appeal thereby facilitating judicial review in a manner for

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[5] To this list can now be added *Lenfest* v. *Caldwell*, 525 F.2d 717, 725-726, 728 (2 Cir.).

which an independent search of the briefs in the trial court cannot substitute, even if the appellate court is ready and able to undertake the task. Second, on this record, respondents' contention is wholly spurious: The materials described at Opp. 48-49 could not have been the basis of the trial court's choice of $1,079,332 *rather than some lower figure,* as defendants urged in both counts below, a position with which plaintiffs' own accountant agreed in substantial part. The elaborate schedule reproduced at Opp. 48 merely creates an illusion of exactitude. For while that schedule shows certain adjustments *made by plaintiffs' counsel* to reduce an even higher figure, and while the "justification for each of such adjustments was explained in Eazor's primary Brief as to damages in the trial court (Supplement Appendix 206b-207b) with precise annotations to the Record" (Opp. 48-49), that schedule does not show (and the "justification" does not discuss) why certain other adjustments were *not* made. Most importantly, the reasoning which respondents attribute to the trial court cannot explain why the loss for the strike period was not reduced to "around $700,000" (Opp. 29) (actually $696,255) as Bache, Eazor's accountant testified was required, and as the exhibits which he prepared [6] established; thus, it remains unknown why the trier of fact rejected the opinion of accounting witnesses for both sides and adopted as a "starting point" a figure more than $375,000 greater than that which the accountants agreed was permissible as proper accounting practice. Nor of course do the materials show why ten other adjustments urged by defendants' accountants (and further reducing the total to $208,375) were not made.

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[6] Exhibit P-183, 3JA (Exhibits) 655a; Def. Int. Exhibit Y-2, 4JA (Exhibits) 1176a, entitled "RESTATEMENT OF LOSSES FOR AUGUST AND SEPTEMBER, 1968 AS PROPOSED BY PLAINTIFFS".

For the same reasons, the Court of Appeals could not have divined the trier of fact's reasoning on the damage issues which the defendants raised on appeal, even if it had reviewed the materials which respondents now say were the basis for his conclusion. And this brings us to an additional reason why respondents' contention here is spurious: There is no indication in the Court of Appeals' opinion that it did review those materials; indeed, those materials were not called to the Court of Appeals' attention by either party, for the obvious reason, that they did not deal with any of the issues which were in dispute on the appeal. (Indeed, though a hasty reading of Opp. 48-50 might give a contrary impression, respondents do not assert that they called those proposed findings and briefs to the Court of Appeals' attention.) The issues which were in dispute on defendants' appeal were the additional adjustments which the defendants urged be made; The Court of Appeals did not take either course which defendants urged: It neither remanded the case for further findings, nor recalculated the strike loss on the basis of some or all those adjustments. Instead, it accepted the District Court's unexplained $1,079,332 figure. The Court of Appeals thereby sanctioned a clear violation of Rule 52(a), a proposition which even respondents do not dispute.

B. In restating Question 2(a) of the Petition respondents say:

> "The damages awarded consisted of the operating losses which two carriers sustained during a four-week period, and both sides produced experts who testified to the amount of such losses on the basis of the same accounting records. The differences in the conclusions reached were solely the result of differences of opinion as to matters of proper accounting practice in specifically defined areas." (Opp. 3)

Respondents thus convey the impression, if they do not actually state in so many words, that the only dispute *between the parties* in the trial court and on appeal was over the issues as to which the expert witnesses were in disagreement. That impression is incorrect. As we have already stated, and as we shall now document, a substantial part of the disagreement between the parties was with respect to adjustments which the expert accountants agreed should be made; that is, while there were "differences in the conclusions" with respect to whether the amount of the strike loss should be $696,255 or some lesser figure to a minimum of $208,375, the experts were in agreement that $696,255 was the maximum which "proper accounting practice" could justify.

This much is grudgingly acknowledged in the Brief in Opposition:

> "When trial resumed, *the defendants called Mr. Bache* [plaintiffs' own house accountant and accounting witness] *as their witness,* and he testified, on the basis of painstaking efforts made since he testified in May, to each specific adjustment which could be made in the figures for August and September, 1968, *by following the methods adopted by Teamster accountants* (J.A. 4463-4498); these adjustments would have reduced the losses in those two months to around $700,000." (Opp. 28-29, emphasis added.)

But respondents attempt to draw the force from that admission by the false or misleading phrases which we have underscored. It is not true that "defendants called Mr. Bache as their witness" (Opp. 28), and that plaintiffs' counsel developed information "on cross-examination of Bache" (*id.* 29). The record is quite clear that Eazor's accountant at no time became defendants' witness:

"MR. DICKSTEIN: Your Honor, I will call him now as for cross.

THE COURT: All right." (13JA 4468).[7]

And respondents' description is misleading to say the least also when it characterizes the revised figures for August and September, 1968 as "following the methods adopted by Teamster counsel" (Opp. 28): the innuendo here (and in the phrase "the same alternative method" (Opp. 29)) is that there remained a dispute between the accounting experts about whether "around $700,000" was the maximum loss which could be attributed to the strike period. Actually, however, that figure was arrived at by Bache himself and was, as noted at p. 6, n. 6 *supra,* set forth in two exhibits prepared by Eazor's accountants, one of which was entitled "RESTATEMENT OF LOSSES FOR AUGUST AND SEPTEMBER, 1968 AS PROPOSED BY PLAINTIFFS". Indeed, plaintiffs' counsel himself had acknowledged in a letter describing Bache's analysis:

> "However, the analysis which Mr. Bache made between May and June, and of which you were provided copies on June 10th, establishes quite clearly that the operating statements for the months of August and September were so skewed by the results of the work stoppage that the losses reflected, while generally accurate on a direct recording basis, *substantially overstated the losses for those months after allocation of expenses* and *revenues to the periods when the expenses were actually incurred and revenue actually earned.*" (P-180, 3JA (Exhibits) 852a-853a).

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[7] This occurred because, although "plaintiffs closed their case with the express understanding that Bache would be called in rebuttal if, as anticipated, the Teamsters accountants testified to proposed adjustments of Bache's figures," (Opp. 27), after those adjustments had been made plaintiffs' counsel refused to state that he would recall Bache and introduce the exhibits he had prepared. (3JA 4467-4468).

Thus, when plaintiffs submitted the figure of $1,079,332 to the trial court they repudiated their own concession, as well as the testimony of their expert witness. Yet, it is that figure which the trial court accepted, and which the absence of specific findings successfully insulated from appellate review.[8]

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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[8] With respect to the prejudgment interest issues, only two points need be made:

As to Question 2(b): For aught that appears on the record the reason that the trial court awarded interest was that it agreed with the position espoused by plaintiffs (Opp. 52) that this award was required by law; in that event, it would not have exercised its discretion as the Court of Appeals surmised, but would have committed an error of law, as the Court of Appeals understood.

As to Question 2(c): There is no basis in the opinion for respondents' assertion that the Court of Appeals "independently determined" (Opp. 4) that prejudgment interest is appropriate with respect to increased judgment. The need for articulated reasons (particularly where the amount involved is as large as here) is further evidenced by the reason which respondents attribute to the Court of Appeals (Opp. 54). Not only is it highly unlikely that the Court decided the question itself because it feared that the trial court would act arbitrarily on remand, that ground for decision, if articulated, would have undermined the Court of Appeals' affirmance of his interest award on the original judgment, and cast further doubt on the propriety of its acceptance of his unexplained strike loss finding.

SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
FEB 18 1976
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*, *Petitioners*

v.

EAZOR EXPRESS, INC., *et al.*, *Respondents*

RESPONDENTS' MEMORANDUM IN REBUTTAL

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*, *Petitioners*

v.

EAZOR EXPRESS, INC., *et al.*,

Respondents

RESPONDENTS' MEMORANDUM IN REBUTTAL

Petitioners state in their Reply Memorandum (page 6) that the materials submitted to the courts below do not show "* * * why ten other adjustments urged by defendants' accountants * * * were not made."

This is not so.

Each one of these proposed adjustments was discussed in detail in the International's Brief on the issues of damages in the District Court (Supplemental Appendix 266b-293b) and in plaintiffs' Reply Brief there (Supplemental Appendix 334b, 393b-405b).

Petitioners also state (Reply Memorandum, page 7): "There is no indication in the Court of Appeals' opinion that it did review these materials; indeed, those materials were not called to the Court of Appeals' attention by either party, for the obvious reason that they did not deal with any of the issues which were in dispute on the appeal."

These statements, too, are wrong.

The very same arguments advanced here were made at pages 37-38 of the International's primary Brief in the Court of Appeals, to which we responded, at page 52 of our Reply Brief, by referring the Court of Appeals to the Briefs in the court below printed in the Supplemental Appendix. Photocopies of the noted pages from the Briefs in the Court of Appeals are appended to this Memorandum.

The District Court necessarily analyzed all of these arguments in reaching its decision as to plaintiffs' losses during the Strike (App. 26a). Also, the Court of Appeals expressly considered, and expressly rejected the defendants' arguments in this regard, stating (65a):

> "The district court threaded its way through this maze and found as a fact that the total aggregate loss suffered by the two plaintiffs during the period of the strikes was $1,079,332.00. * * * All the defendants urge that the loss established by the evidence was only $696,255.00 at the maximum and possibly as little as $208,375.00. Our consideration of the record satisfies us, however, that there was support in the evidence for the finding of the district court that the plaintiffs' total loss was $1,079,332.00 and we cannot say that this finding was erroneous. We, accordingly, adopt that figure as the district court did, as a starting point for the discussion of the damages."

CONCLUSION

Clearly, contrary to the petitioners' arguments, both the District Court and the Court of Appeals properly analyzed each of the many and detailed contentions of the parties with respect to plaintiffs' direct losses during the Strike, and petitioners' arguments to the contrary are fiction. Neither the function nor the calendar of this Court suggests that this matter be passed on once more here.

The Petition for Certiorari should be denied.

TOM P. MONTEVERDE
Attorney for Respondents, Eazor Express, Inc., and Daniels Motor Freight, Inc.

* * *

. . . nate the strike."[36] If causation cannot be determined even with hindsight, it is not fair to charge the union with failing to foresee what actions would benefit the employer. Otherwise the promise to use every reasonable means to terminate the strike becomes a guarantee that the employer will not have any losses due to an unauthorized work stoppage. Even plaintiff does not argue that this is what it bargained for with any of these defendants.

IV. THE CALCULATION OF DAMAGES

A. The District Court's Conclusion As to the Total Loss During the Strike Was Unsupported by Necessary Findings, and in Any Event Was Clearly Erroneous and Should Be Corrected by This Court If Liability Is Upheld

As we have pointed out in our counterstatement of the case (*supra*, pp. 8-9), Eazor itself concluded that its actual loss for the strike period was $696,255 and not the $1,079,-332 which the District Judge used as his "starting point" to compute damages. In addition, in adopting this "starting point" the District Judge failed to make any findings which show how he arrived at the figure of 1,079,332.[37] Moreover, the court also failed to make any finding whatever

36. "Reasonable means" also includes only those means which are normal and appropriate for a union in the triparte relationship of a collective bargaining agreement—employer-employee-union. For example, if the cause of a wildcat strike were the strikers' view that the employer owed them such overtime wages, the union would not be obligated to make up the difference even though the members expressed willingness to return to work if the union were to do so.

37. The number apparently comes from Eazor's brief in support of proposed findings of fact and conclusions of law on the issue of damages (JA (Supplemental) 201b-203b) wherein Eazor's counsel

with respect to the evidence adduced by the defendants to show that the actual loss for the strike period was not $696,255, but rather $208,375. (See 2JA [38] 646-653, International Proposed Finding 55, for calculations).[38]

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attempted to revert to the initial figures which had been corrected and extensively revised by Eazor's own accounting staff. Eazor's counsel thus repudiated his own representation that Eazor's initial figures had "substantially overstated the losses for those months" and disregarded all of the adjustments which had been made by Eazor's accountants in attributing revenues and expenses to proper periods.

38. The question of the amount of loss incurred by Eazor during the months in which the strike occurred was the subject of considerable testimony and documentary evidence. There were conflicts between the experts, not only with respect to application of accounting principles, but also with respect to what were the actual expenses and revenues during these months. Examples of some of the items in dispute follows. The Unions' accountants testified that since terminal and equipment maintenance expense had gone up sharply during the strike period, this reflected extraordinary and/or deferred maintenance which Eazor had chosen to do during the period in which the terminals and equipment were inactivated by the strike and which did not represent a normal, ongoing expense. They therefore reduced the terminal and equipment maintenance to a revenue related formula (12JA 4058-4060, 4065-4068; 4JA (Exhibits) 1167; Exhibit C-2). Similar adjustments in the office and miscellaneous expense accounts would have reduced the August-September loss by $20,237 (12JA 4061-4062; 4JA (Exhibits) 1167a, Exhibit C-2), and a reduction in the equipment depreciation account to reflect the extent to which that equipment was actually used, would have further decreased the August-September loss by $92,300 (12JA 4068-4071; 4JA (Exhibits) 1167a; Exhibit C-2). Evidence was also received of substantial retroactive payments by Mack Truck for repairs made to guaranteed equipment in the period of June 1968 to June 1969. In the absence of records upon which a portion of those payments could be precisely allocated to the months of August and September 1968, an allocation of 1/12th of the total Mack payments to each of these months seemed reasonable and appropriate to the accountants for both sides (13JA 4313-4318, 4330, 4338-4344, 4353-4377, 4391-4400, 4404-4409; Exhibits P176, P177, P178). This one item would have further reduced August-September losses by $46,800, but it also appears to have been neither accepted nor rejected, but simply ignored. There were other disputed adjustments as well.

PAGE 52—EAZOR'S REPLY BRIEF IN COURT OF APPEALS

* * *

. . . ence between the direct Strike losses when calculated by the alternative methods.

As the court below noted (J.A. 675a-676a), the existence of losses of at least this size over the same period could also be established by Eazor's reports to the Interstate Commence Commission. The losses can also be confirmed by comparing Eazor's audited year end figures for 1968 with its unaudited figures as of the end of July of that year (cf. J.A. 585a and 805a), and by calculating losses of profits on the basis of a percentage of revenues lost (J.A. 4641-4646, Ex. P-685-858a), which was the method followed and approved in *L. W. Mead, Inc. v. Brotherhood etc.*, 129 F.Supp. 313 (1955), 230 F.2d 576 (1 Cir. 1956), and *Roadway Express, Inc. v. Highway Truck D. & H. Local No. 107*, 299 F.Supp. 1058 (E.D. Pa. 1969).

Eazor's accountant, and therefore the trial court, accepted, for purposes of argument, most of the adjustments suggested by union accountants, but not all of them were accepted, and the International takes exception to this in a footnote at page 38 of its brief. The reasons, as substantiated in the evidence, for Michael Bache's and the trial court's rejection of the Teamster contentions referred to in the footnote can be established by a review of our Reply Brief as to damages in the court below, as this Court may readily verify by reviewing the Index (J.A. 334b) and the relevant portions of the brief itself. (The arguments responsive to the matters referred to in the Teamster's footnote are discussed in sequence at J.A. 394b-398b).

B. The Teamster Arguments on Mitigation of Damages Considered.

All Union arguments under this heading assume the factual accuracy of the trial court's factual findings with respect to Eazor's alleged intransigence with respect to

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discharges, namely, that Eazor refused to reinstate anyone unless and until all who had been discharged returned to work. Actually, as we pointed out in our primary brief here (p. 34), the record shows no intransigence on the part of . . .

* * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of February 23, 1976, denying certiorari in this case, Justices Brennan and White dissenting.

I.

The Court of Appeals for the Fifth Circuit has issued an opinion on denial of rehearing, clarifying its prior decision in *United States Steel Corp.* v. *United Mine Workers of America,* 519 F.2d 1249, an action

which like the present seeks damages under § 301 for damages due to an unauthorized strike in violation of a no-strike obligation. In its new opinion, the Court squarely stated its holding to be: "For the union to be liable, the evidence had to show that the union in some way made itself a party to the strike or work stoppage violative of the contract" (526 F.2d 377 (Jan. 26, 1976)). That holding is squarely inconsistent with the result reached by the court below, which imposed liability on these defendants although approving the District Court's finding that no defendant had authorized and participated in the strike. There is thus a clear conflict in the circuits on the important and recurring issues of liability in this case, unless the *United States Steel* Court's disavowal of such a conflict (on both the contract and mass action theories) is accepted. On the contract issue, the only basis of distinction between this case and *United States Steel* (as well as *United Construction Workers* v. *Haislip Baking,* 223 F.2d 872 (4 Cir.)), it is that in the present case the no-strike promise was *express* whereas in *United States Steel* and *Haislip* it was *implied.*[1]

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[1] In order to keep our reply memorandum within reasonable limits, we did not therein deal with respondent's effort to distinguish *Haislip* on the alternative ground that the "international union involved in that case was not even a direct party to the collective bargaining agreement in issue there * * *" (Opp. 39). But that fact is beside the point, because the holding which we cited involved defendant United Construction Workers (UCW), which *was* a party to the agreement. Judge Parker held that in determining whether UCW was liable for breach of the no-strike obligation implicit in that agreement: "The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike" (223 F.2d at 877-878).

We note in this connection that by reviving this distinction the court below (and the Fifth Circuit in *United States Steel*) have invited new problems if *Boys Markets* is extended in *Buffalo Forge* v. *United Steelworkers,* No. 75-339, which presently awaits oral argument on the issue whether a strike injunction is available where the strike is not over an arbitrable grievance. If the answer is "yes" in *Buffalo Forge,* where there is an express no-strike clause, would it be the same where the no-strike promise is implied from the promise to arbitrate? *Gateway* had apparently set the distinction to rest in suits under § 301, in conformity with contract law generally. (Pet. 17). Yet, while the decision below stands, it retains life and can only sow confusion in damage suits as this, and in injunction suits like *Buffalo Forge.* Moreover, if this Court should say anything in the latter case to make clear that its decision therein, like *Gateway,* applies to *all* no-strike obligations, petitioners should receive the benefit of that holding.

Because of the somewhat equivocal language of the Fifth Circuit's original opinion in *United States Steel Corp.* with respect to the mass action theory, whereby the court appeared to be disapproving the theory while accepting, for unstated reasons, the opinion in *Eazor,* and because that theory is so patently contrary to the Congressional intent and the decisions of the Fourth and Sixth Circuits which we cited, we did not also rely on *United States Steel* as creating a conflict on that issue. The Fifth Circuit's succinct restatement of its holding in this, however, makes it clear that whatever that court may have believed, the decisions in that case and this are irreconcilable.

II.

A. We earnestly urge this Court to grant reconsideration of its denial of certiorari with respect to the Court of Appeals' affirmance of the trial court's finding that $1,079,000 was the amount of plaintiff's loss attributable to the strike period, although the District Court had failed, in violation of Rule 52(a), to find specially the facts which underlay that figure. Since respondent has perforce acknowledged (Opp. 47, 54) that the District Court did not comply with Rule 52(a) in this respect, its sole argument has been that petitioners were not thereby prejudiced. Yet—and this is why we submit that denial on this point perpetuates a grave injustice—the lack of findings precluded review of the reasoning whereby the trial court arrived at $1,079,000 as the "starting point" of its damage calculation, rather than $696,000 which was the maximum which plaintiff's own accountant testified was fairly attributable to the strike period. (See Pet. Reply 5-9). The result, under the Court of Appeals' view that plaintiff was entitled to recover for all but the first day of that period at Eazor and all but the first two days at Daniels, is that plaintiff has been awarded (prior to prejudgment interest) well over $350,000 which its own accountant testified plaintiff did not lose because of the strike, and which neither the trial court nor the Court of Appeals have ever explained.

These are the stakes which induced respondent to submit an extraordinary Memorandum in Rebuttal in opposition to the Petition for Certiorari. In that rebuttal respondent did not point to any evidence or even any argument which it had made below to explain why $696,000 should not be the maximum starting

point. Nor did it controvert our showing that respondent had, in its Brief in Opposition, falsely stated that its own accountant became *defendants'* witness when he testified to the $696,000 maximum (Opp. 28-29, corrected at Pet. Rep. 8-9) and had sought (at Opp. 48-49) to mislead this Court as to what was before the District Judge, by presenting an elaborate array of figures which represented plaintiff's adjustment of its own earlier claim *downward* to $1,079,000, and therefore could not "explain why the loss for the strike period was not reduced to 'around $700,000' (Opp. 29) (actually $696,255) as Bache, Eazor's accountant testified was required, and as the exhibits which he prepared established" (Rep. p. 6), so that "it remains unknown why the trier of fact rejected the opinion of accounting witnesses for both sides and adopted as a 'starting point' a figure more than $375,000 greater than that which the accountants agreed was permissible as proper accounting practice" (*ibid.*). Rather, in an effort to distract attention from that issue, the rebuttal set up a smoke screen by misstating our arguments on a related point, and then rebutting the argument as misstated. We now show just how respondent did it:

Respondent begins its rebuttal ("Rebut.") as follows:

> "Petitioners state in their Reply Memorandum (page 6) that the materials submitted to the courts below do not show '* * * why ten other adjustments urged by defendants' accountants * * * were not made.'
>
> This is not so." (Rebut. 1)

There follow excerpts from the submissions of both sides to the trial court and the Court of Appeals with

respect to these "ten other adjustments", followed by a portion of the Court of Appeals' opinion wherein the Court states that it has studied the record and found evidence to support the District Court's figure of $1,079,000 as plaintiff's loss during the strike period.

We next set forth the original, showing by italics the language which was excised in respondent's quotation: "*Nor of course do the materials show* why ten other adjustments urged by defendants' accountants (*and further reducing the total to $208,375*) were not made." (Pet. Rep. 6).

Thus, what respondent has done is to replace the phrase "the materials" in the original with "the materials submitted to the courts below" (Rebut. 1). But as clearly appears from the context, our phrase "the materials" referred to "the materials described at Opp. 48-49", (which is how they were described earlier in the same paragraph at p. 6 of our Reply Memorandum), which consisted solely of plaintiff's argument to the trial court as to why certain adjustments should be made from plaintiff's original accounting evidence (prior to correction by its own accountant after examination by defendants' accountants); our phrase did not refer to the arguments made by plaintiff to contest defendants' "ten other adjustments". Thus, by an artful change of what petitioners said, respondent set up a straw man which the remainder of its rebuttal demolished. Additionally, by eliminating our phrase "and further reducing the total to $208,375", respondent avoided reminding the Court of the context of our statement, and particularly that the "ten other adjustments" were a *further* reduction (as to which the accountants were in disagreement)

from the $696,000 figure (as to which the accountants were in agreement although the trial court inexplicably was not.)

What is particularly ironic is that plaintiff's strategems are all addressed to a matter extraneous to the question presented by the Petition for Certiorari, which is whether the courts below violated Rule 52(a) with respect to the damage calculation; everything that respondent has said and done is to show a lack of prejudice due to the court's violation of that Rule. Yet, significantly, it is only because the trial court did not explain how it arrived at the critical $1,079,000 that any of respondent's artifices were possible, since if the District Court had made proper findings, there could be no argument as to how it reached that result. Moreover, Rule 52(a) is designed to protect the appellate courts, including this one from the necessity of searching the record. Thus, by elaborately seeking to deny that prejudice resulted from the absence of findings, respondent has succeeded instead in creating additional prejudice. And since the violation is clear, and the amount involved substantial, this Court should grant certiorari and—if it chooses not to hear the other issues presented by the petition—vacate the judgment below and remand the case to the trial court with directions to re-determine damages in compliance with Rule 52(a).

B. & C. With respect to the issues concerning the absence of findings as to why pre-judgment interest was awarded, we remind the Court that one of them is also pending in *Bangor Punta* v. *Chris Craft,* No. 75-353. *See* Pet. pp. 38-39. That case is presently ripe for decision, the SEC having, since the denial of certiorari, responded to this Court's invitation to file a brief herein.

Here, there is an even more complete failure to make findings, since not only did the Court of Appeals fail to explain why it granted prejudgment interest on a judgment after it was substantially increased on appeal, there were no findings at either the District Court or Court of Appeals level with respect to prejudgment interest on the original judgment. We urge that if the Court grants certiorari in *Chris-Craft,* it should grant certiorari on the interest questions in this case as well, in order to obtain a fuller view of a problem which is of recurring importance in the lower federal courts, and is not often litigated on appeal, since the amounts involved are usually not as great as here and in *Chris-Craft;* alternatively, the Court should withhold its decision of the present petition for rehearing until after *Chris-Craft* is decided.

CONCLUSION

This Petition for Rehearing should be granted. Certiorari should be granted now, or the present Petition held in abeyance until *Buffalo Forge, supra,* No. 75-339, and *Chris-Craft,* No. 75-353, are finally determined.

Respectfully submitted,

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Certificate

I hereby certify that this Petition is presented in good faith and not for delay and restricted to the grounds specified in Rule 58(2) of this Court.

GEORGE KAUFMANN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENT TO PETITION FOR REHEARING

We append hereto* the decision of the United States Court of Appeals for the Third Circuit in *United States Steel Corp.* v. *United Mine Workers of America*, et al.,

* This Memorandum was originally filed in typewritten form and the typewritten opinion of the Court of Appeals was appended thereto. The Clerk has advised us that in substituting these printed copies, reproduction of the opinion is not required.

decided March 16, 1976 (hereafter "*U.S. Steel*").[1] That decision repudiates the *reasoning* of the Court in this case on the issue of implied contractual duty (question 1(a) of the Petition), and also the *result* reached by the *Eazor* Court with respect to petitioner International on the "mass action" theory (question 1(b) of the Petition).[2]

1. The *U.S. Steel* Court held that the duty to use every reasonable means to terminate an unauthorized strike is to be implied from all no-strike promises, whether these be express or implied. In reaching this result that Court categorically rejected the express-implied distinction whereby the *Eazor* Court had distinguished Judge Parker's carefully reasoned opinion in *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 842 (C.A. 4), (see Pet. 16-20 and Pet. for Rehearing 1-2). The *U.S. Steel* court said:

> "If *Eazor Express'* reference to *Haislip Baking* can be understood as suggesting that a reasonable efforts obligation will not be implied from a no-strike obligation that is itself implied, it is mere dictum. And in context, it is far from clear that

[1] The panel consisted of Chief Judge Seitz and Judges Gibbons and Rosenn. The principal opinion (cited herein as "Op.") is that of Judge Gibbons; Judge Rosenn wrote an opinion concerning the result ("Conc. Op."), and Chief Judge Seitz filed a separate concurring (Sep. Op.") wherein he agreed with Judge Gibbons on the points pertinent here (*id.* p. 1), except possibly with respect to the mass action point (discussed at pp. 3-5, *infra*), as to which his unarticulated position may be even *more favorable* to petitioner International than the views of his brethern. Accordingly, in referring to the decision of the Court we shall refer to Judge Gibbons' opinion.

[2] These inconsistencies exist although the present petitioners unsuccessfully sought rehearing *en banc* by the court below. See Pet. App. 28a.

> Judge Maris was doing anything more than distinguishing inapposite precedent, and was actually subscribing to the truth of the proposition. In any event, because we believe that this is a distinction without a difference, we choose not to accord that dictum the force of law."

In support of the conclusion the *U.S. Steel* relied on *Teamsters Union* v. *Lucas Flour Co.,* 369 U.S. 95 and *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, following the identical analysis advanced by us at p. 17 of our Petition for Certiorari. In short, the latest word is that *Eazor's* distinction of *Haislip* was "good for this day and train only"[3] and that the law of the Third Circuit is indeed in conflict with that of the Fourth Circuit on the question whether no-strike promises, express and implied entail the duty to use every reasonable means to terminate an unauthorized strike. Not even respondent has ever disputed the public importance of this question.

2. The *U.S. Steel* decision also repudiates the holding of *Eazor* that an International union can be held liable under the "mass action" theory where the "mass" consists only of the membership of one or two of its locals. The views of Judges Gibbons and Rosenn differ with respect to the nature of the mass action theory, but on this point they are in agreement:
Judge Gibbons writes:

> "As stated by Judge Maris, union liability under this theory is imputed from the concerted activity of the membership. Consistent with theory, however, the liability must be limited to the entity

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[3] Cf. Roberts J. dissenting in *Smith* v. *Allwright,* 321 U.S. 649, 669.

> whose membership acts in concert. In most cases, as here, that entity will be the local union. Thus absent a showing of complicity on the part of a larger union entity—the District or International Union, for example—only the local can be held liable under the mass action theory. Since there is no record evidence demonstrating District 5 or International complicity in the instant work stoppages, only the Local's liability need be considered" (Op. pp. 18a-19)

And Judge Rosenn in his separate opinion says:

> "To be consistent with the theory, however, liability must be limited to the entity, the mass of whose membership acts in concert. This is because the theory presumes that the leadership for the mass action comes from within the group that generates the unlawful action. Thus, in most cases, it will be only the local on which liability is imposed under this theory. There can conceivably also be district and international union liability if there is evidence to show complicty by officers of these entities directly or indirectly in the mass action." (Conc. Op. p. 4, footnote omitted)

In his concurring and dissenting opinion Chief Judge Seitz reaches the conclusion that the District Court in *U.S. Steel* should not have entered any order against the International or the intermediate body, the District Council. Accordingly, while he does not state whether his agreement with Judge Gibbons extends to the latter's reasoning on the mass action theory, it is clear that he, too, would not find the International liable on that theory.

The views of these three Judges reinforce our submission that it is unconscionable to subject the International in this case to a judgment exceeding $1,000,000

before interest for the actions of a miniscule part of its total membership. And since we do not know from the opinions in *U.S. Steel* whether the striking miners in that case constituted all or the major part of the membership of the defendant local (as to which the mass action theory was sustained), it may well be that the reasoning which we have quoted is likewise inconsistent with the imposition of liability on the defendant locals in *Eazor* for the actions of a "mass" consisting of 2% of the members in one instance and 6% in the other. See Pet. 29-30. We also deem it of significance that while the opinions of Judge Gibbons and Rosenn treat with the mass action theory in greater depth than did the opinion in *Eazor,* they nevertheless adhere to the universal pattern of prior opinions which approve that theory in paying no attention whatsoever to that Congressional intent in enacting §§ 301(b) and (e). A court which does so, must reject the mass action theory; we submit that the time has come for this Court to say so.

3. The need to call the *U.S. Steel* opinion to this Court's attention before our petition for rehearing is acted upon, makes it impossible for us to discuss in the detail in which the subject deserves, why, in light of this development, the Court should reverse its previous decision and grant certiorari. The following propositions, do, however, come immediately to mind:

(a) While the grant of certiorari on rehearing is admittedly unusual, it is no more extraordinary than an intervening decision whereby the Court which rendered the judgment of which review is sought disavows the analysis by which it previously avoided a conflict in the Circuits, and simultaneously reverses with respect to at least one of the parties an alternative theory of liabil-

ity. A case more clearly following within the intent of Rule 58(2) of this Court could hardly be imagined.

(b) Since the Third Circuit's decision in *U.S. Steel* is in direct conflict not only with *Haislip,* but with the decision of the Fifth Circuit in *U.S. Steel Corp.* v. *United Mine Wkrs. of Am.,* 519 F.2d 1249, 526 F.2d 377 (Pet. 17, n. 9, Pet. for Rehearing 1-3) and since those cases appear to be part of a running battle between those adversaries, it is inevitable that certiorari will be sought, and highly probable that it will be granted, in those cases We submit that if review is granted in those cases it should be granted in this case also. This would assure that a decision either way is dispositive of the contract question with respect to both express and implied no-strike obligations, and that the defendant in the present case will not be required to pay this enormous judgment on a legal theory subsequently repudiated by this Court as contrary to the Congressional intent. This Court has, on occasion, granted certiorari on an untimely petition for rehearing, or *sua sponte* to achieve "uniformity in the application of the principles announced by this Court." *United States* v. *Ohio Power Co.,* 353 U.S. 98. See also, in addition to the cases cited *id.* at 99, *United States* v. *Maryland,* 382 U.S. 158.

(c) Lastly, we leave this Court with a question: If the Court of Appeals had squarely acknowledged in *Eazor* that its creation of a duty to use every reasonable means to terminate an unauthorized strike is in conflict with the law as declared by the Fourth Circuit, and that the mass action theory is an improper predicate for International liability, would certiorari have been denied in this case?

CONCLUSION

For the reasons stated herein and in our prior submissions, the Petition for Rehearing should be granted and certiorari should be granted.

Respectfully Submitted,

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